# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

## No. 112.

HARVEY FULLERTON, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

FILED SEPTEMBER 4, 1902.

(19,063.)

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1 THE STATE OF TEXAS:

At terms of the honorable court of criminal appeals of the State of Texas, begun and holden within and for the State of Texas, and beginning and ending as follows, to-wit:

Dallas term, beginning January 6th, 1902; and ending March 25th, 1902; Austin term, beginning April 7th 1902, and ending June 27th, 1902; Tyler term, beginning October 6th 1902 and ending December 17th, 1902; Dallas term, beginning January 5th, 1903 and ending March 26th, 1903, and Austin term, beginning April 6th, 1903 and ending June 24th 1903, the Honorable W. L. Davidson presiding justice thereof presiding, the following proceedings on appeal were had in the cause of Harvey Fullerton, appellant, *vs.* The State of Texas, appellee, to-wit:

2 *Caption of Transcript from Court Below.*

THE STATE OF TEXAS, }
*County of Hunt.* }

At a term of the county court begun and holden within and for the county of Hunt, at Greenville, Texas, on the 15th day of July, A. D. 1901, and which adjourned on the 3rd day of August A. D. 1901, the Hon. R. D. Thompson, judge thereof, presiding, the following cause came on for trial, to-wit:

THE STATE OF TEXAS } No. 7677. Offense: Dealing
*vs.* in Cotton Futures.
HARVEY FULLERTON. }

*Complaint.*

Filed July 12, 1901.

THE STATE OF TEXAS }
*vs.* } No. 7677.
HARVEY FULLERTON. }

In the name and by the authority of the State of Texas:

I, —— —— solemnly swear that Harvey Fullerton on or about the 15th day of December, 1900, and before the filing of this complaint, in the county of Hunt and State of Texas did then and there unlawfully conduct, carry on and transact a business commonly known as dealing in futures, in cotton, grain, lard, meats, agricultural products and corporation stocks, and did then and there un-

lawfully keep a house and manage, conduct, carry on and transact therein a business commonly known as a produce or stock exchange, and as a bucket shop, where future contracts were then and there bought and sold with no intention of an actual *bona fide* delivery of the articles and things so bought and sold, against the peace and dignity of the State.

3 C. A. LANGFORD, *Affiant.*

Sworn and subscribed to before me this the 12 day of July, 1901.

C. E. MEAD,
*County Attorney, Hunt County, Texas.*

No. 7677. The State of Texas *vs.* Harvey Fullerton. Affidavit of C. A. Langford. Filed July 12, 1901, E. W. Briscoe, county clerk, Hunt county, Texas.

*Information.*

Filed July 12, 1901.

THE STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

In the name and by the authority of the State of Texas:

C. E. Mead, county attorney of the county of Hunt and State aforesaid, in behalf of said State, presents in the county court of said county, at the July term, A. D. 1901, of said court, that Harvey Fullerton, on or about the 15th day of December A. D. one thousand nine hundred and before the filing of this information, in the county of Hunt and State of Texas, did then and there unlawfully conduct, carry on, and transact a business commonly known as dealing in futures, in cotton, grain, lard, meats, agricultural products, and corporation stocks; and did then and there unlawfully keep a house and manage, conduct and carry on and transact therein a business commonly known as a produce or stock exchange, and as a bucketshop, where future contracts were then and there bought and sold with no intention of an actual *bona fide* delivery of the articles and things so bought and sold, against the peace and dignity of the State.

4 C. E. MEAD,
*County Attorney, Hunt County, Texas.*

Endorsements: "No. 7677 The State of Texas *vs.* Harvey Fullerton. Information. Filed July 12, 1901, E. W. Briscoe, county clerk, Hunt county, Texas.

*Judgment.*

STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

JULY 20TH, 1901.

On this day this cause being called for trial came the parties and announced ready for trial, and the defendant waived a jury and entered his plea of not guilty, and submitted his cause to the court; and the court after having heard the evidence adduced and the argument of counsel, it is considered by the court that the defendant, Harvey Fullerton is guilty as charged and his punishment assessed at a fine of two hundred dollars, and imprisonment in the county jail thirty days.

It is therefore ordered by the court that the State of Texas to have and recover of and from the defendant Harvey Fullerton the said sum of two hundred dollars fine and all costs of this prosecution, and that he be imprisoned in jail for thirty days, and the defendant being present in court, it is ordered that he be remanded to the custody of the sheriff by him to be confined in jail until the fine and costs are fully paid and said imprisonment is discharged, and that execution issue against the property of the defendant for such fine and costs.

5 *Statement of Facts.*

Filed July 27, 1901.

County Court, Hunt County, Texas, July Term, 1901.

THE STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. —.

Be it remembered that on the trial of this cause the following facts were all the facts proven on said trial:

J. L. BROWN, witness for the State, testified:

I live in Greenville and have been living there about three years. I am engaged in the cotton business,—that is my main business. I buy cotton, ship cotton and look after Clark & House's business. I buy on the streets and other places too. I know Mr. Gillot and Mr. Fullerton—got acquainted with Fullerton after he came here either in December or January I am not sure. I think the business was running at the time Fullerton came here. I have had dealings

with him over there in the cotton business. I think my dealings commenced in December and I don't think I did any business there after February. I cannot say that I can give a proper definition of the term "broker." I am not a cotton broker and the people I represent are not—they buy cotton for themselves—they buy for the cotton mills. When I buy cotton it is delivered. As to the nature of the transactions I had with Mr. Fullerton, I bought some cotton, some wheat, some corn and may be something else—I know I bought those things. My transactions were very limited; I did not buy much—small account. I don't remember how much I bought; I don't think I ever bought over 100 bales of cotton; possibly not that much; I usually bought very small amounts. I think the first transaction I had with Fullerton was cotton—cotton had declined some is my recollection now and I thought
6 it was going to advance and I told Mr. Fullerton to buy some cotton—I don't remember how much it was—and he did so, and later on I sold it—had him sell it for me later. He is the man that bought it for me. I don't remember how many bales of cotton I got on that deal. I made deals there bought cotton several times—I don't think I ever bought over 100 bales at a time. I don't remember what I paid for it. The first I bought was for delivery in March I think. I bought what was called March futures.

It was not delivered to me I only paid the margin required "Margin" is a reasonable amount supposed to be put up to protect all parties interested. They put up all the way from $1 to $5 a bale margin. The cotton was not delivered to me. I had several transactions with Mr. Fullerton—cannot say how many—never had anything delivered to me.

I put up some money—that was to cover what I call margin. It was not the contract that if the cotton goes higher I had to hold it until the time of the delivery. It was merely March cotton—you did not have to hold it you could close it out whenever you got ready. If I wanted to close the deal I would tell him to sell my cotton and then I would get whatever profit the advance had given me. Suppose I bought it for ':60—March cotton—and I put up $100 margin and in a week it falls one cent, if I disposed of it I would pocket my loss. If the price declined enough, in a week, to take up my margin I would have to remargin or lose what I had put up. I mean by losing that I would lose the margin I had put up. If the market declined low enough and it was necessary to put up more margin I guess I would put up the margin. I did not have to watch the market, he always let me know. I sup-
pose he would let me know just like he did the others;
7 he could call me up over the phone or send me word just as quick as he could. I have seen him do others that way. I have been up there several times when they did notify people. I don't know any they did not notify. I don't call any instance to mind where the fall was so sudden as to drop down enough to take up the margin all at once. I have remargined several times. They

never closed down on me unless I told them to. I think I had to close down some cotton a time or two, that there was right smart loss in, they never did close down without giving me a chance to remargin. The reason they would close out my cotton away yonder ahead when it was to be delivered in March was because the present price had declined and I did not want to hold it on margin. It was regulated by the current price of a day—if the price of it one day went so low you would have to remargin. The cotton had to be delivered by a certain day. I think about the 25th. They told me the time. In spots you specify when your delivery is to be made—you keep right up with them and see that they are delivered on that day. In all the transactions that I had in that business I never had a delivery. I have seen people buying over there) I have been around there a good deal. I have been present when several deals were made—a dozen, possibly a hundred or more—I have been present when a good many deals were going on. I have seen them buy on one day and dispose of it on the same day. The shortest time I have ever seen anyone hold a thing they bought up there, was I think, a hour or two. It was futures they bought. There had been a fluctuation in the market. They got those telegraphic dispatches almost constantly. They have a blackboard and they write down the changes in the market on it. They got the latest trans-
8 actions that have transpired on the cotton exchanges of New York and New Orleans; they put down these transactions, whatever they are, the prices paid, what it is bringing at the time, they write it down—9¼, 9⅝ or whatever it is they put it down as it transpires. That is not spot sales it is future delivery. They quote the wheat from Chicago and the bonds and stocks I think from New York. They don't put the amount but just the prices up there. The purpose of it is to show what the market is at the time. If there is a fluctuation they would put it down? As to what effect this fluctuation would have on me would depend upon whether the market was advancing or declining. If I had bought and the market had advanced I would feel pretty good and if it was declining I would feel the other way. If I bought at one time and the market rose before buying at another I would pay higher prices. Then in three hours—or in any given time—if it fell enough to exhaust my margin I would have to remargin. Then I would turn around and buy at that price again. The office up there has two rooms I think. There is a table and some chairs on one side and on the other side they have a blackboard whereon they write the prices. They have a table in the center of the room and a desk in one end. I have not been up there for several months. Then they have another table in the front. I believe that is all I remember. I don't know how many men are associated with it. They are usually two men that stay up there. Mr. Fullerton and his brother staid up there at that time. I would go up there at the front and tell them what I wanted; sometimes there would be other parties

standing around. I never did carry the Fullertons off to one
9 side but did my business openly. I have seen them carried aside but I never thought about any one seeing me. I would tell them what I wanted and the orders were usually executed there without going to one side. The amount of cotton that is produced in the United States in a year, I think, runs from eight million to eleven million bales. I have been in the cotton business about 14 years. There are exchanges of this kind in every town the size of this in Texas. The most that I ever saw any one man buy in this cotton exchange was 400 bales, may be more. I think 100 bales is the most I ever bought at once—usually from 20 to 100 bales at once is what I bought. The eight or eleven million bales that is made is consumed by the mills. It is not bought by contract like I made up there. The people I buy for usually get their orders directly from the mills or directly from some one at Liverpool or some other place that represents mill. Most of the cotton is consumed on deals like I am talking about. My judgment is there is more cotton bought and sold on futures than there is made, but this is only guess work. Some of it may be bought and sold 100 times. One will buy and sell to another and perhaps there is a thousand transactions on one lot of cotton. I never knew of anybody that had bought from these people that had any cotton delivered. Cotton would have to be delivered when it was bought. I don't know of anything that was ever delivered. I don't know of anybody that ever required it. I don't know of anybody that ever bought and expected to have a delivery. When I sold I cannot tell who I sold to. I would tell Mr. Fullerton to sell. Fullerton was acting as agent and I did my business through him. I don't — I ever had any trouble in making a delivery of anything I sold. I was never called upon to make a delivery. I don't remember to
10 have told Mr. Fullerton I would deliver it when I sold my stuff. I don't think he ever asked me if I was prepared to deliver it. Yes, there was something said about delivery. We talked about that. I know one time I had some cotton, I believe and I made the remark that if I had money enough I would have the cotton delivered. I believe I would too but I was not able to carry it out.

Cross-examined:

It is a fact that when I went around there and wanted to buy anything I simply instructed to buy whatever it was that I wanted to buy. If I wanted to buy 100 bales of cotton in December to be delivered in New York in March I instructed them to buy me 100 bales of cotton on the terms I mentioned. He did not actually seel me the cotton—I signed a slip or a contract for the purchase of that cotton and he then telegraphed to some stock exchange or somebody to buy the cotton to cover the amount of my purchase. If I went in there in December and wanted to buy

100 bales of cotton in New York, March delivery, I stated the price and he wired to some produce exchange or cotton exchange to buy that much cotton for March delivery. It is a fact that the sale of the cotton did not take place until there was a confirmation of the sale by wire from the party to whom he wired announcing the fact that it had been placed. I did not actually buy anything from him. He was acting as agent. I did not sell anything to him. I would tell him to buy or sell for me. I simply instructed him to buy or sell for me whatever I wanted, and he did it. He would do that by telegraphing to some one outside of the State to place that order either to purchase or sell. That was the invariable rule with me.

11 (Being handed a copy of the contract used in the cotton exchange business, witness said) Yes sir, I think that is the same form of slip they used last winter, about the same. I read the instructions on the back of this last winter. I simply instructed him to buy for me in the market or sell in the market for me whatever I wanted, but sometimes I would not want to buy unless he could get it at a certain price. Whenever he bought or sold it was on the market; if it was cotton it was New York or New Orleans; if it was grain it was Chicago or Kansas City. He made the purchase or made the sale for me—acting as my agent in the matter. I paid him simply a commission on whatever he bought or sold for me. He telegraphed all these orders to Kansas City and they were accepted or turned down there. My contract was not consummated until there was an acceptance of it from Kansas City. When I went in there I saw the market quotations on the wall—he kept them up there regularly. If I wanted to buy or sell 100 bales of cotton I simply instructed him to buy or sell that much cotton signing one of these slips. They have a blank there for the number and are all numbered. He wired this correspondent, whoever he was, at Kansas City, to buy or sell in accordance with the order whatever it was I wanted and it was done. That was confirmed from Kansas City, the place to which he wired. If it was not confirmed there was no purchase, or sale. I put up a margin. That was to protect the transaction in case of a fluctuation in the market. If the market went down so that margin was absorbed I either put up an additional margin to cover the further decline or else instructed him to sell the cotton for me and pocketed whatever profit or loss there was in the transaction. I think that all these slips

12 specify that an actual delivery is expected unless the contract is closed out before delivery day comes around. The reason I never had anything delivered to me was because he closed out for me under my instructions before the date of delivery came round. If I had bought 100 bales of cotton and it was going down and I did not care to put up the margins I would instruct him to sell the 100 bales to cover the amount. If the market went up and I still wanted to close out and take the profits I would instruct him to sell and would reap my profits. I say I thought about taking some cotton I bought at one time—of having an actual delivery—I

did not take it because under the circumstances at the time I did not feel able to carry it. If I had been able to carry it I would have carried it for a further rise in the market. I would have carried the actual cotton. I recognized that under my contract which Mr. Fullerton had executed for me I was entitled to the delivery of the cotton if I wanted it. It would have been delivered to me if I had instructed; instead of doing that, however, I closed the matter up by instructing a sale of it, and he sold it under my instructions. New York and New Orleans are the only cotton they handle. Of course if it is delivered to me at either place, if I wanted it shipped again, I could instruct and have it sent wherever I wanted it to go.

Redirect examination:

There was very little difference in my circumstances at the time I bought and turned loose the cotton I was talking of wanting to carry through. When I bought I did not expect to have it delivered, but after I bought I decided I would have it delivered
13 if I had money enough. I don't know whether they investigated anybody's financial standing or not. I don't suppose they do. They require a margin to be put up. There is nothing else but a margin. The man does not have to have a bank account. I suppose that they thought that the margin required was sufficient to guarantee them against loss. At the time you buy cotton or have it sold you pay that margin to Mr. Fullerton. I did not say he was my agent. I said acted as my agent in that transaction. I cannot say that I ever heard him solicit business. Mr. Guillot advertised the business in the Dallas, News, and may be some other papers. They do not make a deal there. Every deal they get instructions—wire first, and if they close you out it is the same thing. If I let my margin run out it is closed out. I don't know what becomes of it. If the price runs down and I don't want to remargin they would close it out right then. They wire somewhere to do that I think. When you buy you buy so many articles subject to the rules of the exchange, when your margin is gone he sells. That slip is a buying contract. The selling contract is similar to that. When the sale was made he would make up a copy of it. If it was closed up because I would not put any more margins he would fill up the kind of form, one similar to that, and if there was any additional loss more than the margin that was put up I had to pay it; if there was any left he would pay it back to me.

Recross examination:

In other words the sale was consummated in Kansas City and all the deals made by Mr. Fullerton I know of were made in that way.
Speaking of the cotton I spoke of a while ago. Suppose I did
14 not have a dollar and I bought for future delivery 100 bales of cotton at 8 cents and suppose at the date

of delivery it was worth 8 cents I would have the cotton to pay for the cotton. It is just as broad as it is long—if a man buys 1000 bales and he has the cotton to pay for the cotton he is able to pay for it. He can sell the cotton and pay the debt. What I mean by not taking the cotton is that I didn't feel able to invest that much money and hold the actual cotton for a future time, and if I had taken the cotton my circumstances were such that I would have had to sell it at that time in order to pay the debt.

Redirect examination:

I cannot explain the difference between this and a bucketshop—I don't know what a bucketshop is. Question: We will say that a bucket shop is a plan fixed for the purpose of gambling in futures where the parties don't intend to make any delivery but intend to speculate on the price; can you explain the difference in that and this? Answer: I cannot, I don't know.

JOHN PEARCE, witness for the State, testified: I am acquainted with Mr. Fullerton. I got acquainted with him in the fall or winter. I know where his place of business here is. I have had some deals with him. My dealings commenced in December or January. I bought some cotton futures and some wheat and some railroad stock from Mr. Fullerton. He was tending to the business there. I had some five or six separate transactions with him, may be more; maybe it would run up to eight or ten; I don't remember exactly. 100 bales of cotton is the most that I ever bought at once. It seems to me that I bought March and January cotton. 10,000 bushels of wheat is the most I ever bought at once. None of it was ever delivered to me. I never had anything that I bought there delivered to me. I bought and when the market went up I generally sold. If I buy 100 bales of cotton and it went down 20 points if I didn't put up I lost $100. It was closed out when it went below the margin unless I backed it up and when it went above the margin I generally ordered it sold. If you sell it means a delivery. I never did expect to make a delivery. They never asked me to make a delivery to them and I never knew of anybody delivering any produce over there. I have bought futures there in the morning and closed them out in the evening. There was a fluctuation and I closed them out. This is very common practice. As to who would watch the market this was owing to the kind of instructions you would give. For instance you buy 100 bales of cotton and put up $100, and if you tell them that if it went down you wanted to back it up they would notify you. If there was no notification and it went down you lost and heard nothing more about it. You bought say 100 bales of December cotton to be delivered in March and put up $100 margin and go away and tend to your business and say nothing about it in a week if the cotton market falls enough to take up the $100. you have nothing; that is, if it falls below 20 points. You

would execute no paper or contract with him after that. You would do nothing. When you buy they give you a slip showing what you bought.

Cross examination:

When I bought that 100 bales I put up $1. a bale as a margin and I understood from that at the time that if the cotton went down 20 points, if the quotations on New York exchange went down 20 points, that would exhaust my margin. Right on the
16 start when we buy anything, when we authorize Mr. Fullerton to buy anything our instructions are either to let it go or to notify us and we will put up an additional margin. The understanding between us was that if it went down 20 points I would either put up more margin or he would close the matter out. If you bought and did not have any instructions and it went down 20 points you were out. If it went up you would have to watch after it yourself and draw out your margin. This was understood at the inception of the thing—if the cotton went down 20 points or more you could either protect it by additional margins or that the cotton would be sold to cover the fluctuation in the market. Soon after you went in there to buy 100 bales of cotton or anything else there was a slip given you showing what it was. This slip was not given showing every transaction. For instance you buy 100 bales and tell him that if it goes down you will back it up with $100 they won't give you any slip. They don't give any additional slip but it is given at the inception of the thing. Whenever you wanted to buy cotton you told him you wanted him to buy for you 100 bales of New York cotton, March delivery, and one of these slips was executed and made out and then he telegraphed. For instance cotton was 8:20 and I thought it was going up I would tell him I wanted 100 bales at that and he would say: "I will get you in the market the best I can, and may be it may be lower" and he would report it. I don't understand telegraphy. When I would buy or sell he would go to the telegraph instrument and telegraph, but of course I didn't know what he was saying. — as I understand it all my orders were telegraphed to Kansas City, Mo. and consum-
17 mated there. I did not actually buy anything *to* him at all; he was simply buying and selling for me in the markets—that is the way I understand it. If it was cotton it was New York or New Orleans, but you could hardly buy it through New Orleans—New Orleans was so slow in getting it; generally bought it through New York. If I wanted to buy I would tell him I wanted 100 bales of New York March cotton; he would go ahead and tell me where he got the cotton and I would give him the check to cover the margin.

Redirect examination:

Question: Do you know what dealing in futures is, for instance cotton is worth 8½ cents to-day and you think it would be worth more to-morrow, you buy, say March cotton, and if the market goes up you make by it and if it goes down you lose, Is this dealing in futures that you are doing? Answer: That is what they call it.

Venue in this case was admitted by defendant on the trial of the case.

BEN WILLIAMS, witness for the State, testified: I live in Greenville, and have known Mr. Fullerton about six or seven months. I have had dealings with him. The nature of this business was buying and selling commercial commodities. I bought several articles and sold several articles—sugar, wheat and cotton—I don't remember whether I bought anything else or not. I bought various amounts at a time sometimes 10,000 bushels and sometimes $40,000 bushels. I can't say how much I owned at once, may be 50,000 or 60,000 bushels. I may have had that much bought and sold. As to cotton I don't remember more than a 400 bale transaction at a time. As to sugar a couple hundred shares—something like that; 150 shares I believe is the most I owned at one time. I never had any of these
18 articles delivered to me—no deliveries or demands. When I sold I never delivered anything. I cannot tell what was the magnitude of the business conducted over there—whether it was much or little. I saw others, I suppose they were dealing there, the way the business is transacted the bystander is not supposed to know. One man don't know very well what the other fellow is doing. Generally a man does his business with Mr. Fullerton and the bystander is not presumed to know. Most of the men are peculiar and they like their business to be transacted privately. Question: Are you in a place where you are prepared to take care of 45,000 bushels of wheat? Answer: I think I have a barn here that would hold that much. It is fixed up for wheat. It don't need fixing specially for grain. Question: Have you got a warehouse to keep cotton in? Answer: I see that cotton lying around; Brother Whatley kept a lot of it on the ground, I didn't have and didn't need any insurance on cotton—the deliveries were to be made in case of demand. I had not samples of cotton there. The kind I was buying was middling cotton. I had no samples of wheat. It was all to be of proper kind; it was to be classified under commercial classes—first class stuff. Spot cotton you understand is such as is sold on the streets; of course while it was an actual sale of cotton it was not what I call spot cotton—it was an actual sale of cotton to be delivered in case of demand, I never expected it to be delivered to me. I certainly did not expect to deliver what I was selling. I did not have to. Question: Would you have made the deal if you had to actually deliver it? Answer: I don't know about that—that is a different question—I don't suppose I would—that is what I re-

gard as a difference in dealing in spot cotton, that is street
19 cotton, you understand. I never heard of any cotton or sugar that Fullerton sold being delivered—not enough sugar to go in a cup of coffee.

Cross examination:

I bought cotton, wheat and sugar—I don't mean I bought sugar bur sugar stocks. That is stock certificates—so many shares of sugar—it goes in shares, 10, 20, or 100. Suppose you wanted to buy in December 100 bales of cotton for delivery in the following March, the process is this: You went to Mr. Fullerton and told him that you wanted to buy 100 bales of cotton for March delivery—if you wanted to you stated the price at which you wanted him to buy that much cotton. He took your order for that cotton and it is true with reference to all other deals they made that they consummated the sale or purchase or sale in Kansas City in every instance. You did not in fact buy or sell anything from Mr. Fullerton here. It was to be executed in the several markets. If it was grain the order was to be executed in Chicago. If it was cotton the order was to be executed in New Orleans or New York, sugar executed in New York and all other orders executed outside of Texas. He simply telegraphed your order as you gave it to him and the contract was consummated outside of Texas and it was sometime before it was confirmed. I say that no cotton was delivered to me that I bought and I did not deliver any that I sold. Suppose I bought 100 bales in December for March delivery, if the 100 bales were not delivered I sold 100 bales of cotton, that just offset the other. If I bought New York cotton it would be delivered in New York, if New Orleans in New Orleans. I recognized that when I bought that cotton if
20 the contract was finally consummated—if I didn't sell before the date of delivery—it would be delivered to me at the place where I bought on the 25th of that month. The 25th of the delivery month is the day upon which settlements are made. If the party expects to deliver the cotton he must give me notice on the 25th of the month. I don't know how many days he has to deliver it in. You are presumed to be able to take care of it if he makes actual delivery. If you have got the 100 bales of cotton you owe for you are able to pay for it. Suppose I give you notice on the 25th of the month that I am going to deliver to you 100 bales of cotton, you can draw a draft on it and pay for it right there—no trouble about that. All these contracts I made either for purchase- or sales were consummated in one of the markets outside of this State. I neither bought or sold to defendant in this case anything, future or otherwise, he simply executed my orders for making these purchases or sales in these various markets. That is they are executed by telegraphing to these markets and the sale or purchase confirmed there. There was no purchase or sale in any instance until the order was telegraphed to the outside markets and executed and sent

in. As I said a while ago many orders failed to be executed where the price was stipulated. It could not be consummated except in the market where it was bought.

Re-direct examination:

You understand the order goes in and takes a little time and sometimes the market advances 5 points in five minutes. In fact I remember giving an order over the telegraph and the order advanced from 8:02 to 8.10 in five minutes. If a man gives an order to an operator to buy 100 bales of cotton at 8:05 and
21 he could not get it in the market at that price the order could not be executed. I put in an order for 400 bales of cotton and the market advanced ten points before the order could be executed. This party here (Fullerton) is the only man I had any dealings with—the only man I knew. He proposes to be taking orders. He was representing himself as doing the business for the parties that wanted business transacted. I cannot say that all these orders were telegraphed to Kansas City. I have had it explained to me. For instance, in executing orders for cotton his facilities for transmitting messages to New York are better than to New Orleans. I don't know that they did all their business through a firm in Kansas City. I understand they were a part of the Christie Company at Kansas City. Later I understand that Guillot Bros. had several establishments of their own. I don't give that as knowledge. I did not get it either from Mr. Fullerton or Mr. Guillot. I don't know what a bucket shop is.

State rests.

A. S. GUILLOT, a witness for defendant, testified:

My home has been in Gainesville for the last year and a half. I know the defendant in this case. I am engaged in the business of a commission merchant at Ardmore and Greenville. I have a business here. We conduct a cotton exchange here; people who wish to buy anything for future delivery, they give us an order and we send the order to our correspondent in Kansas City: if the order is accepted by them or their correspondents they notify us and we notify our customers, we act as agent for customers. We conduct here what you call a cotton exchange. We take orders at those places for future delivery of cotton, grain, stocks, and things of that sort. The firm is Guillot
22 Bros. The form of the transaction is this, suppose a man wants to buy 100 bales of cotton now for delivery in October. New York cotton, this (a blank order) is the form we use. It is an order to buy. The paper reads: "Please buy for my account and risk subject to the rules of the exchange" whatever the article may be, naming it. If it is 100 bales of cotton it is put down on the blank following it. the next is the place where it is to be delivered and the next place when it is to be delivered giving the month.

Take a paper like that, suppose it is executed by John Smith, he comes to our place of business over there and tells Mr. Fullerton he wants to buy 100 bales of cotton to-day for delivery in Oct. the process by which it is executed is this: Mr. Fullerton sits down to the key and sends an order to our correspondent in Kansas City, they in turn place the order with their correspondent who operate the exchanges of the country. When that order is accepted they advise Kansas City and they advise us whether the order is accepted. If it is not accepted they don't say anything. We never close the contract over there with the customer ourselves. We send to our correspondents in Kansas City, if they accept they notify us and we advise our customers. All the orders are sent to the Christie Company. This business over here itself never bought or sold anything for future delivery. It has made quite a number of actual deliveries upon contracts that were executed through it. The rule where a party buys say today for future delivery in Oct. 100 bales of cotton and it is carried on until the day of delivery comes is this: The party that sold the 100 bales he may live in Minnesota or Iowa—the seller has the option to say
23 when this delivery is to be made but he is to give five days' notice thereof before he delivers it. When he has given the notice and the time expires the buyer has to take or we have to take for him and pay the draft. We have made several deliveries here. This is a warehouse receipt attached to a draft for 5000 bushels of wheat, No. 2 wheat. It was sold to one of our customers here and has been delivered. That paper represents a delivery of 5000 bushels of wheat at Kansas City to Mr. S. A. Beckham who lives in Greenville. It has been paid, there is a check for it. Attached to the draft is a Union Pacific ware house receipt and the wheat has been paid for through a purchase made through the Greenville office. I don't remember any other deliveries here. I have not been here much of the time; I don't take active management of this office. When an order is received by us from any customer here on that blank form to buy an article we telegraph to the Christie Grain & Stock Company at Kansas City. I understand they sent it to their broker on whatever exchange it is to be placed on. I am notified of the consummation of the contract when I get the information. This concern over here never buys or sells to persons that come in there anything for future delivery. The concern of which I am a member and at which Mr. Fullerton works makes none of these purchases or of those sales in Texas.

It has never made one in Texas. If a man comes in there and buys 5000 bushels of wheat for future delivery in a given month in the future and it is not delivered and he don't want the delivery, I will have to sell 5000 bushels to cover the amount. He has got the amount and I sell it to cover the amount of the purchase. In case the party wants the actual thing he has bought delivered he
24 don't have to do anything at all, the thing is delivered to him, the seller gives five days' notice, that is the rule of all ex-

changes, the seller has the option of five days' notice, and if the date of delivery comes around and that notice is given the delivery takes place. If a man sells something to be delivered in July the notice day is on the 25th day of July. He gives notice that he is going to deliver on the 31st day of July and makes draft and attaches his warehouse receipt and inspection certificate.

Cross-examination:

Mr. Fullerton is our managing partner. He is responsible to me and me to him in this matter. I don't know about telling you that I was the proper man to be brought up and tried if any body was to be tried. If there is any guilt I am just as guilty as Mr. Fullerton. My brother lives in Gainesville runs the Ardmore exchange. The Christie Company are our correspondents. It is a corporation organized under the laws of Missouri. My understanding is that they have warehouses to take care of produce and everything. I got some delivered from there that I bought for Sam Beckham. It was delivered here this week sometime, and I suppose since Mr. Fullerton was prosecuted in this case. There has been other deliveries at Greenville—two other cases—I think one in April and I have forgot when the other was—I could look at the draft. I don't remember what the Beckham wheat sold for. I don't know what you call a "spot sale." I have been in the cotton business a year and a half. Yes, I can give you a general explanation of what a bucket-shop is. A bucket shop is where the orders are filled in the office. A party comes and wants to buy 5000 bushels of wheat and it is sold right there. A bucket shop, they don't contemplate delivery, our business we notify our customers that we will fulfill the
25 contract. We certainly do aim to deliver the stuff. I don't know that it is impossible to deliver the stuff or that there are one thousand times as much sold as there is in the world to deliver and I don't know that there are futures sold in this country to the extent that it would be impossible to find stuff to deliver. I do not know that there are people dealing like I am dealing all over the country. I told you they were running in every town in the United States the size of Greenville. When a man sells it another buys it. This does not show that they have no idea of delivering it and cannot deliver it. Question: You sell 400 bales of cotton—Answer: We don't sell anything. Yes, I have known one of our customers selling that cotton to somebody else. They could go to the Paris exchange and sell that 400 bales of cotton. I know of an instance like that—know it in a general way. When they want to close out for convenience they go to the same place to the same man. When he wants to sell it he comes in and tells me. When the margin is gone it goes without instruction—if he don't put up more margin we have to sell it. Yes we say in the heading of the slip that a customer is presumed to be financially able to carry out the contract. I would not sell to a negro. My customers

around here all have money. A man's responsibility has something to do with it. It would be delivered to us if he don't take it. If a man put up $200 margin and went off without any further instructions at all and the price dropped until his margin was taken up, of course we asked him for more margin to protect the contract. If he had gone I would try to reach him. If I could not do that I would protect myself. If the price had dropped so
26 I would lose $100 in selling it I would make him pay the $100. I can give instances of that all over the country. If he is responsible I would sue him on the contract. I say in the contract that I reserve the right to throw it on the market when the margin is eat up and I would hold him on the contract if it goes below, for all the margins it had gone below. We don't have any contract like this to turn it loose on—he generally gives written instructions sometimes signed on one of these selling blanks. I had not seen the draft I had here a while ago, before then and I don't remember the date of it. I think probably Mr. Fullerton has told me something about it. I don't remember when the contract was made. Counsel hands witness a paper and witness says: I think this was an order given last week for delivery this week. It was given along about the 13th of July and was to be delivered the following week. The draft is through the First national bank. The price of the wheat was 61 cents. The wheat was delivered here. No, it has not got here yet, the warehouse receipt constitutes delivery. He can have it shipped here if he wants to, just freight rate from Kansas City here. I think we had a couple of other contracts for the delivery of 500 bushels of wheat. The wheat was to be delivered through us. I cannot tell how many deals Sam Beckham has made through us. It has been a long time since I talked to Mr. Beckham. He has been sick for several days.

Redirect examination

This warehouse receipt (referring to the 5000 bu. wheat for Beckham) was executed July 10th. I don't know when the purchase was made the invoice states the 13th, that is when it was de-
27 livered to us, it might have been a month ago for all I know. About the quantity bought and sold—one horse may be bought and sold a hundred times and that would not be a hundred horses—some one has to buy when one sells. If it is delivered it has to be transported. It is delivered in New York. It has to be there when it is delivered. There are allowances for grades of cotton. No. 2 wheat, all one kind or allowances for anything below that according to the rules of the exchange. Cotton is figured on the basis of middling, wheat is figured on the basis of No. 2. They do that for convenience in fixing the market and naming a market price. That is done everywhere.

HARVEY FULLERTON, defendant, in his own behalf, testified:

I live here and am the defendant in this case. The business over there is conducted in this way: Suppose a man comes in there to-day and wants to buy 100 bales of cotton for future delivery in New York. He fills out a contract stating how much he wants to buy, and what month he wishes it delivered and where he wishes it delivered. I transmit this order by telegraph over our private wire we have to Kansas City and they transmit to New York. If the man wants to buy New York cotton they transmit it to the New York cotton exchange and secure the cotton for him and report the matter to me from Kansas City—that the purchase has been made covering the order. He does not know until I notify him through Kansas City whether the order has been placed or not. Where a man sells 100 bales of cotton the process is the same. If before the day of delivery comes around he does not want
28 to receive—to have a delivery of the cotton he has purchased, he comes to me and orders me to sell it and I transmit his order by wire. In the transaction of our business, I do not actually sell or buy anything and have never done so. Since I have been here I have never bought or sold anything for future delivery in any Texas market. I don't remember the date when Mr. Sam Beckham bought, it was sometime ago; he bought for July delivery. The draft on Mr. Beckham was for $3050. It has been paid. I have made other deliveries here. Where a man comes to me and wants me to buy for him 100 bales of cotton, suppose he has bought it last December for March delivery and when the day for delivery comes around if he has not made a sale of it, the result is we will deliver the cotton to him or they notify us that they will deliver the cotton. When the contract is entered into for the thing to be bought it is stated where the delivery is to be made, and the delivery will be made there and can be shipped wherever he wants it to. In giving the orders, when a person wants to buy or sell anything I telegraph the order to Kansas City to Christie Grain & Stock Co. I don't in fact for myself or anybody buy or sell these things. In addition to this character of business we furnish the market reports to cotton men. Say they want to buy of a farmer a couple of hundred bales of cotton to be delivered in ten days, they come to us at the time they buy it, they know the market is so much higher and they come to us and place an order in New York to sell 100 bales of cotton and they pay us here for the markets so much per month. They pay us this to find out what the market quotations are—that is a part of our business. I receive these
29 reports every time during the day that there is a fluctuation and I report to the cotton men who buy cotton what these quotations are, and in that way they are advised of the state of the market. I report to the grain men and commission men generally—these are the kind of transactions that also take place.

Cross-examination:

Yes sir, each cotton buyer pays me for furnishing these quotations; they pay us for furnishing information the same as the Western Union Telegraph Company because we own a private wire. We receive enough from the cotton men to keep up our business, that is how we came to be here in the first place—at the request of the cotton men. At Sulphur Springs the cotton men want us to come there they want to keep up with the markets and they want us to open an office there. I do not set myself up over there as agent for anybody. If a man wants me as his agent to buy cotton I will do it. I and Mr. Guillot put ourselves in business over there. I know Mr. Ben Williams. We advertise in the papers that we have a business over there and invite people to come up there and deal with us. I will buy the spot stuff—cotton—in this State for anybody that wants it, and will sell it for them. He does not have to put up money if he is handling spot stuff. Question: Say that he comes there and tells you he wants to sell 100 bales of cotton for delivery in Oct. Answer: I will hunt him a buyer and he has got to put up money. Question: Did you ever see a man sell a bale of cotton on the streets and put up money? Answer: That is spot stuff and this other is futures, outside of the State; we don't buy any futures
30 in this State. We do buy futures outside of the State, I buy it for him if a man wants to buy it. I could not say how much spot cotton I have bought since I have been here. Sam Beckham holds spot cotton that matures in this month. He is the man that feels that if there is money in it he will take the actual thing itself. Yes sir, I got a check from Mr. Beckham for the wheat. It is now in the First national bank—my brother transacted the business himself—I am quite sure it was cashed at the First national bank. I could not tell you just when the deal was made. It was delivered last week—on the 10th in Kansas City. I made the trade instantly over the wire. I never saw the wheat—I don't have to see it, it is inspected in Kansas City. Beckham did not see it but he knows he got it. Yes he could have 500 on the same principle and it would take but 15 minutes to arrange it and it would just as soon as he paid the draft. Beckham's deal was the same as the rest—he signed the slip and it was to be delivered when he wanted it delivered. The deal was consummated in Kansas City. I suppose he gave me the order in the office. He never had any delivered before. We have had parties who bought wheat and it matures and the wheat was delivered to us and we would take it ourselves. Question: If a man comes in and buys from you—Answer: He don't buy anything from us. In the case you put; if a man comes there and leaves an order for 400 bales of cotton to be delivered, say in Oct. and puts his margin and goes away, say that he put up $200 margin and goes away, and then suppose he comes back in a few days and says that he wants to sell some cotton,

I would sell that same cotton if he instructed it. In the
31 other case you put: If he had bought 400 bales through us to be delivered in October and then he would turn round in three days and sell 400 bales of cotton to me would that close the incident between me and him? No sir, it would not. It would be two separate transactions unless he instructed me to sell the same cotton purchased. It is kept separate on the New York exchange. We distinguish it from other cotton by the number of the order. If I sell 100 bales of cotton if you were in New York you might buy it, when I close it out it is the same cotton. If as you say, he buys 400 bales of different cotton and puts up $400 then he turns round and sells 400 bales for Oct. delivery and say the other is Oct. delivery, he would still have to put up $400 more. He would have up $800. on the one deal—on buying 400 bales and the other selling 400 bales. Question: And they don't have any connection with each other. Suppose that he gets that 400 bales of cotton through you and goes over to Paris to sell the 400 bales, they will hunt that up in New York exchange? Answer: I don't know anything about that. I know what I have done. I bought wheat in Illinois and went up to Chicago and closed the wheat out there and I went back and got the margin. If a man buys 400 bales through me and puts up $400 and he goes over to Paris and sells it I would gibe him back the margin—$400. It cannot be imaginary cotton. He may hold it until the month of maturity. I would not transact any business for a man that was not responsible and could not deliver the cotton. I never refuse to sell a man as much as he wanted if he has the money. The drouth and boll worms do not affect the amount
32 of cotton I would sell; you may sell it a thousand times before it reaches Liverpool. Every bale is numbered and is never lost. Question: You have had men to sell you cotton that you knew couldn't get that cotton because they were not financially able to. Answer: They didn't sell me any cotton. In that case we would be responsible for the margins.

Redirect examination:

As a matter of fact I did not sell any of those things, I simply pl ced the orders that were left with me and they were consummated at Kansas City. That has been the course of business all tha time. Yes, this is the slip that we use when a man comes in ane wants to buy—the kind we have him fill out and sign. That is thedrule—the manner in which we conduct the business. The selling slip is the same except the wording. The word sell is used whe re the word buy is used in this. Defendant offers in evidence the slip testified about as follows:

"No. —. Time. ——.

GREENVILLE, TEXAS, ——, 190–.

Guillot Bros., commission merchants:

Please buy for my account and risk, subject to the rules of the exchange.

Article ——

Price ——

To be delivered at ——

During ——

Partial payment —— Closed —— this order is offered for the acceptance of your correspondents subject to the conditions on the reverse side, which have been fully noted and which is hereby
33 fully agreed to. I hereby appoint you as my agent to secure an acceptance of the same.

Signature —— ——.

*Notice.*

It is assumed that the party giving this order is in every way financially able to complete the contract. It is understood that this order is subject to the acceptance of the correspondents of said Guillot Bros., at Kansas City, at which point all necessary revenue stamps are affixed. It is further understood that the said Guillot Bros., are employed as my agents to use their best endeavors to secure an acceptance of this order, and that they are not to be held liable for any wire failure or other unavoidable accident which may prevent satisfactory service. All orders for the sale or purchase of any commodity or article or securities are received and executed with the distinct understanding that actual delivery will be insisted upon, and the party giving this order so understands and agrees. Parties giving orders for stocks will indicate when they wish these securities delivered. On grain, provisions and cotton, shipping instructions will be asked for and furnished on settlement day, as provided for by the rules of the exchange where the contracts are placed.

The Christie Grain and Stock Co., correspondents of the said Guillot Bros., request that their clients be advised that they reserve the right to throw this or any other contract that they may have upon the open board when the funds in their hands protecting same are deemed insufficient to protect them against loss by adverse market fluctuations."

34 The State and the defense agree that T. Y. Casey, Sam Nuremburg and four others would testify substantially as the witness Ben Williams testified as shown by his testimony in this statement of facts.

We agree that the foregoing is a true statement of all the facts proven on the trial of this cause.

C. E. MEAD,
*County Attorney, Hunt Co.*
L. A. CLARK,
CRADDOCK & LOONEY,
*Attorneys for Defendant.*

The foregoing is hereby approved as a true and correct statement of facts proven on the trial of the above cause.

R. D. THOMPSON,
*County Judge, Hunt County.*

No. 7677. The State of Texas *vs.* Harvey Fullerton, "Statement of facts" Filed August 1st, 1901, E. W. Briscoe, clerk county court, Hunt county, Texas. By J. H. Patterson, deputy.

*Original Motion for a New Trial.*

Filed July 20, 1903.

In County Court, July Term, 1901.

STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

Comes the defendant in the above cause and moves the court to set aside the judgment rendered in this cause and to grant him a new trial therein for the following reasons: viz:

First. Because the affidavit and information charge no offense known to law.

35 Second. Because the court erred in overruling and in not sustaining the defendant's motion filed July 18, 1901, to quash the affidavit and information.

Third. Because the judgment rendered herein is contrary to the law and to the evidence, because the evidence shows without controversy that the defendant did not conduct or carry on or keep a place where future contracts were bought and sold.

CRADDOCK & LOONEY,
*Att'ys for Def't.*

No. 7677. State of Texas *vs.* Harvey Fullerton, Original motion for new trial. Filed July 20, 1901. E. W. Briscoe, clerk county court, Hunt county, Tex., by J. H. Patterson, dep.

*Order Allowing Amendment of Motion for New Trial.*

STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

JULY 20, 1901.

It is ordered by the court that the defendant be and is hereby granted leave to file his amended motion for a new trial in this cause of this date.

*Defendant's Amended Motion for New Trial.*

In the County Court of Hunt County, Texas, July Term, 1901.

STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

Comes the defendant in the above cause and amends his motion for a new trial, filed herein on the 20 day of July, 1901, and for such amendment the defendant now here moves the court to set
36 aside the judgment rendered against him in said cause on the 20th day of July, 1901, and to grant him a new trial for the following reasons, viz:

First.

Because the judgment of conviction is contrary to and without support in the evidence in this:

The evidence showed without contradiction that the defendant was not engaged in dealing in futures in cotton, grain, lard, meats, agricultural products or corporation stocks where future contracts for said articles, or either of them, were bought and sold; that the defendant neither bought nor sold any of said articles, or either of them or conducted any business in which said purchases or sales, or either of them, were made, but that in the conducting of said business he merely acted as agent for the persons desiring to purchase or sell said articles and placed their orders and sales with a commission firm in Kansas City, Missouri; that all such purchases and sales and all the contracts therefor were entered into and consummated in the markets of the country outside of the State of Texas.

Second.

Because the evidence failed to show that the defendant kept any house or managed, conducted, carried on or transacted therein any

business known as a produce or stock exchange or a bucket shop where
future contracts in any of the articles named in the statute
37 were bought and sold, with no intention of an actual *bona fide* delivery of the article and thing so bought and sold, but on the contrary the evidence showed without contradiction that no future contracts in any of the articles, or either of them, were either bought or sold by the defendant or in the said house or place of business, and that in the conducting of said business the defendant acted uniformly and solely as the agent for the intended purchaser or seller and that all the future contracts for such purchasers and sellers were entered into and consummated outside of the State of Texas and that none of them were made in said house and place of business of the defendant.

Third.

Because the evidence failed to show that there was no intention on the part of the defendant of an actual *bona fide* delivery of the article or articles so bought and sold, but on the contrary it showed that in all the purchases and sales that were made through the agency of the defendant it was understood and agreed that actual delivery would be insisted upon.

Fourth.

Because the evidence failed to show that the defendant was keeping or conducting any house where future contracts were bought and sold with no intention of an actual *bona fide* delivery of the article or thing bought and sold within the meaning of the law, but on the contrary the evidence showed that the defendant conducted a place where information as to the status of the markets could be
had promptly at all times; that he furnished said information
38 to cotton buyers and others for compensation paid to him by them and that in fact the place of business was established for that purpose.

L. A. CLARK,
CRADDOCK & LOONEY,
*Attorneys for Harvey Fullerton, Defendant.*

No. 7677. State of Texas *vs.* Harvet Fullerton. "Amended motion for new trial." Filed July 27th, 1901, E. W. Briscoe, clerk, county court, Hunt county, by J. H. Patterson, deputy.

*Order Overruling Amended Motion for New Trial and Notice of Appeal.*

STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

AUGUST 1", 1901.

Now, on this day came on to be heard the defendant's amended motion for a new trial in the above entitled and numbered cause, and the court having heard the said amended motion, and being fully advised in the premises, is of the opinion that the same should be in all things overruled. It is therefore, ordered, adjudged and decreed by the court that the defendant's amended motion herein be and the same is hereby overruled, to which ruling of the court, the defendant, in open court, excepts and gives notice of appeal to the court of criminal appeals of the State of Texas, and the court now sets the recognizance of the defendant at six hundred dollars.

*Recognizance, Aug.* 1, 1901.

STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

AUGUST 1ST, 1901.

39 This day came into open court Harvey Fullerton, defendant in the above entitled cause, who, together with W. L. Beckham and F. J. Phillips, his sureties, acknowledge themselves severally indebted to the State of Texas in the penal sum of six hundred dollars conditioned that the said Harvey Fullerton who has been convicted in this case of a misdemeanor, and his punishment assessed at a fine of two hundred dollars, and imprisonment in the county jail thirty days, as more fully appears by the judgment of conviction duly entered in this cause, shall appear before the court from day to day and from term to term of the same and not depart without leave of the court, in order to abide the judgment of the court of criminal appeals of the State of Texas in this cause.

40 *Assignment of Errors.*

In County Court of Hunt County, Texas.

STATE OF TEXAS
*vs.*
HARVEY FULLERTON. } No. 7677.

Comes the defendant in the above entitles cause and assigns the following errors committed by the county court upon the trial of said cause, to-wit:

First.

The court erred in finding the defendant guilty and in rendering the judgment of conviction in this cause for the reason that said judgment is contrary to and without support in the evidence in this: The evidence showed without contradiction that the defendant was not engaged in dealing in futures in cotton, grain, lard, meats, agricultural products or corporation stocks where future contracts for said articles, or either of them, were bought and sold; that the defendant neither bought nor sold any of said articles, or either of them or conducted any business in which said purchases or sales, or either of them, were made, but that in the conducting of said business he merely acted as agent for the persons desiring to purchase or sell said articles and placed their orders and sales with a commission firm in Kansas City, Missouri; that all such purchases and sales and all the contracts therefor were entered into and consummated in the markets of the country outside of the State of Texas.

Second.

The court erred in finding the defendant guilty and in rendering the judgment of conviction in this case, because the evidence failed to show that the defendant kept any house or managed, conducted, carried on or transacted therein any business known as a produce or stock exchange or a bucket shop where future contracts
41 in any of the articles named in the statute were bought and sold, with no intention of an actual *bona fide* delivery of the article and thing so bought and sold, but on the contrary the evidence showed without contradiction that no future contracts in any of the articles, or either of them, were either bought or sold by the defendant or in the said house or place of business, and that in the conducting of said business the defendant acted uniformly and solely as the agent for the intended purchaser or seller and that all the future contracts for such purchasers and sellers were entered into and consummated outside of the State of Texas and that none of

them were made in said house and place of business of the defendant.

Third.

Because the court erred in finding the defendant guilty and rendering the judgment of conviction in this cause because the evidence failed to show that there was no intention on the part of the defendant of an actual *bona fide* delivery of the article or articles so bought and sold, but on the contrary it showed that in all the purchases and sales that were made through the agency of the defendant it was understood and agreed that actual delivery would be insisted upon.

Fourth.

The court erred in finding the defendant guilty and in rendering the judgment of conviction in this case because the evidence failed to show that the defendant was keeping or conducting any house where future contracts were bought and sold with no intention of an actual *bona fide* delivery of the article or thing bought and sold within the meaning of the law, but on the contrary the evidence showed that the defendant conducted a place where information as to the status of the markets could be had promptly at all times; that he furnished said information to cotton buyers
42 and others for compensation paid to him by them and that in fact the place of business was established for that purpose.

L. A. CLARK,
CRADDOCK & LOONEY,
*Attorneys for Harvey Fullerton, Appellant.*

No. 7677. State of Texas *vs* Harvey Fullerton. "Assignment of errors." Filed August 14th, 1901, E. W. Briscoe, clerk, county court, Hunt county, Tex. By J. H. Anderson, deputy.

*Bill of Costs.*

THE STATE OF TEXAS *vs.* HARVEY FULLERTON. } No. 7677. Offense: Dealing in Cotton Futures.

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|---|---|
| Docketing and entering cause | .25 |
| Entering indictment—information | .10 |
| Docketing 4 motions | .40 |
| Filing 8 papers | .80 |
| Issuing capias | .75 |
| Issuing 4 subpœnas | 1.00 |
| " 15 additional names | 2.25 |
| Appearance | .15 |
| Entering 2 orders | 1.00 |
| Swearing witnesses | 1.80 |

| | |
|---|---|
| Entering final judgment | .50 |
| Issuing commitment | 1.00 |
| Taxing costs | .25 |
| Recognizance | .50 |
| Transcript on appeal | 14.00 |
| Executing capias | 1.00 |
| Taking bail bond | 1.00 |
| 43 Mileage on capias | .10 |
| Summoning 18 witnesses | 9.00 |
| Mileage on subpœnas | 4.10 |
| Commitment and release | 2.00 |
| Jury fee | .50 |
| County attorney's fee | 10.00 |
| Trial fee | 5.00 |
| Fine | 200.00 |
| Total | $257.45 |

*Certificate.*

THE STATE OF TEXAS, }
*County of Hunt.* }

I, E. W. Briscoe, clerk of the county court of Hunt county, Texas, do hereby certify that the above and foregoing pages from one (1) to thirty-five (35) inclusive, contains a true and correct transcript of all the proceedings had on the trial of cause No. 7677, The State of Texas *vs.* Harvey Fullerton, tried at the July term of the county court of Hunt county, Texas.

Given under my hand and the seal of the county court of Hunt county, Texas, at office in Greenville, Texas, this the 31st day of August, A. D. 1901.

E. W. BRISCOE,
[L. S.] *Clerk County Court, Hunt County, Texas.*
By J. F. HALES, *Deputy.*

Endorsements on transcript: No. 2565, 2nd assignment. Harvey Fullerton, appellant, *vs.* The State of Texas, appellee. From the county court of Hunt county. Filed in the court of criminal
44 appeals at Dallas the 15 day of Oct. 1901. J. M. Gaston, clerk. Filed in court of criminal appeals at Austin, Texas, 4-2-1902, M. P. Smith, clerk. Filed in court of criminal appeals at Tyler, Texas Sept. 9, 1902 E. B. Wiggins, clerk. Filed in court of criminal appeals at Dallas, 12-23-1902. J. M. Gaston, clerk. Filed in court of criminal appeals at Austin, Texas, 4-2-'03. M. P. Smith, clerk.

45 *Order Showing Submission.*

HARVEY FULLERTON
*vs.*
THE STATE OF TEXAS. } No. 2360. From Hunt County.

Jan. 29, 1902.—Submitted on briefs and oral arguments for both parties.

*Order Transferring Cause to Austin.*

HARVEY FULLERTON
*vs.*
THE STATE OF TEXAS. } No. 2360. From Hunt County.

March 24th, 1902.—Taken under advisement and transferred to Austin.

*Judgment of Court of Criminal Appeals of Tex.*

WEDNESDAY MORNING, *June* 11, 1902.

HARVEY FULLERTON
*vs.*
THE STATE OF TEXAS. } 2337. Appeal from Hunt County.

Opinion by Davidson, P. J.

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is ordered adjudged and decreed by the court that the judgment be in all things affirmed, and that the appellant and his sureties on recognizance, W. L. Beckham and F. J. Phillips, pay all costs incurred in this court and that this decision be certified below for observance.

46 *Opinion of the Court of Criminal Appeals.*

HARVEY FULLERTON, Appellant,
*vs.*
THE STATE OF TEXAS, Appellee. } No. 2337. 5th Assignment. Appeal from Hunt County.

Opinion.

Appellant was charged with conducting and carrying on a business, commonly known as "dealing in futures" etc.; and that he did then and there keep a house and manage, conduct and carry on and

transact therein a business commonly known as a produce or stock exchange and as a bucket shop, where future contracts were bought and sold with no intention of an actual *bona fide* delivery of the articles and things so bought and sold.

The contention is that the evidence does not show a violation of the statute. The facts, which are rather voluminous, show that appellant opened a business in Greenville, Hunt county, where he bought and sold futures in cotton and wheat; that he acted as the agent of the purchasers and sellers; that he had connections east, perhaps in Kansas City with the Christie Brothers; that these orders were taken and telegraphed to New York and New Orleans for cotton futures, and to Chicago for grain futures; that he was not himself buying and selling, but simply acted as the agent of the purchasers and vendors. The business was carried on, it seems, as the ordinary shops of that sort; that where the purchasers of the futures would place the money with him and his firm they would telegraph and place their offer. If the offer was accepted he would notify the purchasers. The record shows no
failure to secure a placing of the offer. He would keep
47 the parties posted of the fluctuations of the market; and
where there was a change, these parties were required to put margins or place more money to prevent forfeiture of their contracts. They did not have any cotton themselves and did not control any, and made no contracts and sold no contracts on their own behalf. This evidently, and it occurs to us necessarily, indicated there would be no deliveries on their part. The contracts for the future delivery, if the delivery should ever occur, were to be had in the market where the contract was placed, and as appellant was not the agent of the purchasers or sellers as the case might be, never became responsible to them for the delivery of any cotton or grain as his relation was simply that of a go-between. Art. 377 Penal Code provides: "If any person shall, directly or through an agent or agents, manage to superintend for himself, or shall as agent or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats or agricultural products, or corporation stocks, or shall keep any house or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and sold with no intention of an actual *bona fide* delivery of the article or thing so bought or sold, such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty," etc. It occurs to us that, under this state of case, appellant has clearly brought himself within the provisions of this art. of our Penal Code. It is clear from the testimony, as we understand it, that appellant was carrying on his
48 business as the go-between, the agent of these parties; was
carrying it on for himself and acting as the agent of parties who were buying and selling futures in cotton and wheat; and that

under his contract the real intent was simply for the parties to speculate in the rise and fall of prices, with no *bona fide* intention of delivery on the part of appellant. It is evident that on the part of the parties making the purchase that they had no intention of expecting a delivery of the cotton under the purchase of the futures, and that the whole matter was understood by the parties at the time to be simply a wager upon the rise and fall of the prices; a speculation or bet on the fluctuation of the prices in the article in which they were dealing. We believe, under the decisions, that appellant has clearly violated this statute. The judgment is affirmed.

DAVIDSON,
*Presiding Judge.*

Delivered June 11th, 1902.

Filed in the court of criminal appeals at Austin, Texas, June 11, 1902.

E. P. SMITH, *Clerk.*

*Appellant's Motion for Rehearing.*

Filed in ct. crim. appeals, at Austin, June 18, 1902.

In the Court of Criminal Appeals, Austin Term, 1902.

HARVEY FULLERTON, Appellant,
*vs.*
THE STATE OF TEXAS, Appellee. } No. 2337.

To the honorable court of criminal appeals:

Comes the appellant in the above cause and moves the court to set aside the judgment rendered herein on June 11, 1902, affirming the judgment of the court below and to grant him a rehearing in this cause for the following reasons:

49 First.

The court erred in its findings of fact to the effect that "appellant opened a business in Greenville, Hunt county, where he bought and sold futures in cotton, wheat, etc."

*Statement.*

The uncontradicted evidence in this case was that appellant neither bought nor sold future contracts in anything. The testimony of appellant and Ben Williams, which is a fair sample of all of it on this point was as follows:

Appellant, testified: "The business over there is conducted in

this way: Suppose a man comes in there to-day and wants to buy 100 bales of cotton for future delivery in New York. He fills out a contract stating how much he wants to buy and what month he wishes it to be delivered in and where he wishes it delivered. I transmit this order by telegraph over our private wire to Kansas City and they transmit it to New York. If a man wants to buy New York cotton they transmit it to the New York cotton exchange and secure the cotton for him and report the matter to me from Kansas City—that the purchase has been made covering the order. He does not know until I notify him through Kansas City whether the order has been placed or not. Where a man sells 100 bales the process is the same." Tr. pp. 22–23. * * * In giving the order when a person wants to buy or sell anything, I telegraph the order to Kansas City to Christie Grain & Stock Company. I don't in fact for myself or anybody buy or sell these things. In addition to this character of business we furnish the market reports to cotton men. * * * They pay us here for
50 the market so much per month. They pay us this to find out what the market quotations are—that is part of our business. I receive these reports every time during the day that there is a fluctuation and I report to the cotton men who buy cotton what these quotations are and in that way they are advised of the state of the market. I report to the grain men and commission men generally. They pay us for furnishing information the same as the Western Union Telegraph Company because we own a private wire. We receive enough from cotton men to keep up our business. That is how we came to be here in the first place—at the request of the cotton men." Tr. 23, 24. The blank contract which customers are required to execute, referred to in the testimony of this witness, will be found on pages 26 and 27 of the transcript. This contract, as well as all of the testimony, shows that appellant bought and sold nothing; that he simply acted as agent of his customers in transmitting their orders to Christie Grain & Stock Company, of Kansas City, Mo.

Ben Williams, testified: "Suppose you wanted to buy in December 100 bales of cotton for future delivery in the following March, the process is this: You went to Mr. Fullerton and told him that you wanted to buy 100 bales of cotton, March delivery—if you wanted to you stated the price at which you wanted to buy that much cotton. He took your order for that cotton and it is true with reference to all other deals they made, that they consummated the sale in Kansas City in every instance. You did not in fact buy from or sell anything to Mr. Fullerton here. He never sold anything to or bought anything from me. It was to be executed in the several markets. If it was grain the order was to be executed
51 in Chicago. If it was a cotton order it was to be executed in New Orleans or New York, sugar executed in New York and all other orders executed outside of Texas. He simply tele-

graphed your order as you gave it to him, and the contract was consummated outside of Texas, and it was sometime before it was confirmed." Tr. p. 16.

Second.

The court erred in overruling and in not sustaining the appellant's first and second assignments of error and his proposition thereunder. To constitute the offense denounced by the statute the dealing or business must be based upon the fact that future contracts are bought and sold, or the house where it is conducted must be a place where such contracts are bought and sold.

*Statement.*

See statement under first head above, which is here referred to.

*Argument.*

The contention of appellant urged in the trial court and in this court is that the facts proven do not bring him within the charge alleged in the information nor within the terms of the statute.

The statute as construed by this court in the Cathran and Goldstein cases, 36 S. W. R. 273 and 278, contemplates that the offense may be committed in one of two ways. First, by conducting directly or through an agent any business commonly known as dealing in futures in cotton, etc. *where future contracts are bought and sold*, with no intention of a *bona fide* delivery, and second, the keeping of a house *where such future contracts are bought and sold* In either case the future contracts must there be bought and sold.

52 Says the court in the Cathran case: "In order to charge an offense under this statute it would be necessary to allege, not only that the business commonly known as dealing in futures was conducted * * * but it must be further alleged that it was a business where future contracts are bought and sold." And again: "The dealing in futures must be where future contracts are bought and sold with reference to some one or more of the articles or things about which the contract is made."

Keeping in mind this construction of the statute, then how can it be said under the facts presented by the record that appellant conducted a place or carried on a business where future contracts in the things named were bought and sold? Leaving out of view for the present all the testimony tending to show that in all the transactions with or through appellant actual delivery was contemplated on delivery day, unless before that time the transaction had been otherwise closed, then clearly every contract that was made by any person, through appellant, was not made in Texas but in the markets

of the cities of other States. No contract was ever consummated here.

The offense, therefore, if one was committed, was committed within the State where the contracts were consummated. To illustrate: Smith went to appellant and wanted him to buy for him 100 bales of cotton for future delivery. Appellant took his order therefor on the blank form copied in the record, wired it to the Christie Grain & Stock Company, Kansas City, Mo., who in turn consummated the purchase on the New York cotton exchange. It is precisely the same thing as if appellant had by telephone conversation with some broker in New York had him arrange the matter
53 there. The offer is made in New York and not elsewhere. It is there the contract to purchase the cotton is made and hence it is the place where the offense, if any, is committed. All these transactions with appellant are clearly within the rule announced by the supreme court of Missouri in the Gritzner case, 36 S. W. R. 39, where it is distinctly held that the contracts were consummated not in Missouri, where the accused lived and was prosecuted, but in Chicago where the contracts were made, and that the offense, if any, was the offense against the laws of Illinois and not an offense against the laws of Missouri. Following the decision in the Cathran case *supra*, construing our statute, the same result would seem logically inevitable in this case.

## Third.

The court erred in overruling and in not sustaining appellant's third and fourth assignments of error and propositions made thereunder.

### *Statement.*

Without incumbering this motion with the statement of facts we beg to direct the attention of the court to the facts stated on pages 10 and 11 of appellant's brief, referring to the contracts executed at the inception of each transaction. Also the following further testimony:

BEN WILLIAMS: "I recognized that when I bought the cotton if the contract was finally consummated—if I did not sell before the date of delivery—it would be delivered to me at the place where I bought it on the 25th of that month." And again: "There was no purchase or sale in any instance until the order was telegraphed to the outside markets and executed and sent in. As I said awhile ago *many orders failed to be executed*, where the price was stipu-
54 lated. It could not be consummated except in the markets where it was bought."

Testimony of GUILLOT: "It (referring to the business) has made quite a number of actual deliveries upon contracts that were executed through it. The rule where a party buys today for future delivery in Oct. 100 bales of cotton and it is carried on until the day of delivery comes is this: The party that sold the 100 bales, he may live in Minnesota or Iowa, the seller has the option to say when this delivery is to be made but he is to give him five days' notice before he delivers it. When he has given the notice and the time expires the buyer has to take it or we have to take it for him and pay the draft. We have made several deliveries here."

*Authorities*

Drouilhet *vs.* Pinckard, 42 S. W., 135.
Cleveland *vs.* Heidenheimer, 44 S. W., 551.
Clews *vs.* Jamison, 182 U. S., 461.
W. U. Tel. Co. *vs.* Hill, 3rd Ct. Rep., 110.

*Argument.*

If however, the court should adhere to its conclusion that the dealings in this business were such that no actual *bona fide* deliveries were in contemplation of the parties, then if the decision of the Cathran case correctly construes the statute, there can be no question under the testimony that there was never a transaction, through the appellant, in which any future contract in any of the articles named in the statute was made within the State of Texas. If under the statute the business must be one in which future contracts are bought and sold, then there is no testimony to sustain the
55 contention that the appellant ever bought or sold any future contracts. Through the means at his command for telegraphing all these contracts were placed through the Christie Grain & Stock Company, at Kansas City, Missouri, on the exchanges either in Chicago, New Orleans or New York. The contracts were consummated on these exchanges and not in Texas.

Fourth.

The court erred in sustaining and in *not* reversing the judgment of conviction, because under the facts disclosed by the record and found by the court in its judgment of affirmance, all the transactions of appellant relating to future contracts in things bought and sold through him related to and were matters of interstate commerce and the statute under which this prosecution is based, as construed by the court in its judgment affirming the conviction in this cause, is in violation of art. 1, section 7 of the Constitution of the United States, conferring exclusive power upon Congress of the United

States to regulate commerce with foreign nations, among the several States and with the Indian tribes.

All of which is respectfully submitted.

L. A. CLARK,
JNO. T. CRADDOCK,
*Attorneys for Harvey Fullerton, Appellant.*

Filed in court of criminal appeals at Austin, Texas 6, 18, 02.

E. P. SMITH, *Clerk.*

56 *Order Transferring Cause to Tyler Term.*

HARVEY FULLERTON
*vs.*
THE STATE OF TEXAS. } No. —. From Hunt County.

June 23rd, 1902.—Taken under advisement and transferred to Tyler.

*Order Submitting Motion for Rehearing.*

HARVEY FULLERTON
*vs.*
THE STATE OF TEXAS. } No. 2578. From Hunt County.

October 29, 1902.—Submitted on motion for rehearing.

*Order Transferring Cause to Dallas Term.*

HARVEY FULLERTON
*vs.*
THE STATE OF TEXAS. } No. 2578. From Hunt County.

December 17th, 1902.—Taken under advisement and transferred to Dallas.

*Order Transferring Cause to Austin Term.*

HARVEY FULLERTON
*vs.*
THE STATE OF TEXAS. } No. 2565. From Hunt County.

March 25, 1903.—Taken under advisement and transferred to Austin.

*Order Overruling Motion for Rehearing.*

HARVEY FULLERTON
*vs.*
STATE OF TEXAS. } June 24, '03.

Opinion by Davidson, P. J.

This cause came on to be heard on the motion submitted
57 by appellant for a rehearing and the same being considered by the court, is overruled.

*Opinion on Motion for Rehearing.*

Filed June 24th, 1903.

HARVEY FULLERTON, Appellant,
*vs.*
THE STATE OF TEXAS. } No. 2483. 5th Assignment. Appeal from Hunt County.

Opinion.

At a previous term of this court the judgment herein was affirmed, the opinion being confined exclusively to a consideration of the facts. This was in accordance with the then expressed wish of counsel for appellant, as set forth in their brief. Motion for rehearing was filed and the indictment not attacked. After the submission of the case on motion for rehearing, counsel who had been subsequently employed placed a little additional brief in the record, calling our attention to the fact that the indictment was not sufficient under the authority of Cothran *vs.* State, 36 Tex. Cr. 196. Under the authority of that case the indictment in this case is hardly sufficient. We have carefully reviewed the statute and the Cothran case, *supra*, as well as Goldstein *v.* State, 36 Tex. Cr. 193. The intimation in those cases, especially in the Cothran case, is to the effect that a contract of sale must be specifically alleged, though it is not expressly so held. If such is the holding and effect of those two cases, a careful inspection of our statute would indicate that they are wrong because it denounces a penalty against a party who for himself or as agent of another carries on the business of buying and selling future contracts, etc. And this is
58 more clearly shown in the latter clause of the statute, which provides that each day such business or house is carried on or kept shall constitute a separate offense. To give it the construction that the specific sale or contract must be alleged in the indictment or information would nullify this latter provision of the statute,

because that provision makes a separate offense for each day the business is carried on or transacted, whereas if each sale constituted a separate offense we might have an indefinite number of offenses committed during one day, because in that event each sale would be a distinct offense. This statute is somewhat analogous to the statute which defines and punishes the keeping of houses of prostitution which makes and constitutes each day a separate offense. We believe the information is sufficient under art. 377 P. C., and that any intimations in the case of Goldstein and Cothran, *supra*, contrary to this view are not correct. The charging part of the information is as follows: That Harvey Fullerton, "did then and there unlawfully conduct carry on, and transact a business commonly known as dealing in futures, in cotton, grain, lard, meats, agricultural products, and corporation stocks; and did then and there unlawfully keep a house and manage, conduct, carry on and transact therein a business commonly known as a produce or stock exchange, and as a bucket shop, where future contracts were then and there bought and sold with no intention of an actual *bona fide* delivery of the articles and things so bought and sold," etc. The motion for rehearing is mainly devoted to an attack on the original opinion wherein the evidence was held sufficient. We have carefully examined the record, and believe the former opinion is correct. The record clearly demonstrates that defendant was
59 carrying on a business denounced by art. 377 Penal Code. We do not care to further review that phase of the case. The motion for rehearing is overruled.

DAVIDSON,
*Presiding Judge.*

(Delivered June 24, 1903.)

60 UNITED STATES OF AMERICA, *sct:*

The President of the United States of America to the honorable judges of the court of criminal appeals of the State of Texas, at the city of Dallas, State of Texas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said court of criminal appeals of the State of Texas before you, between Harvey Fullerton, plaintiff in error and The State of Texas, defendant in error a manifest error hath happened, to the great damage of the said Harvey Fullerton, plaintiff in error as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at Wash-

ington D. C., and filed in the office of the clerk of the Supreme Court of the United States, on or before the 18th day of September, 1903, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office in Dallas, Texas, this 18th day of August, in the year of our Lord one thousand nine hundred and three and the seal of the circuit court at Dallas Texas and the signature of the clerk.

{ The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas. }

J. H. FINKS,
*Clerk of the Circuit Court of the United States for the Northern District of Texas.*

Allowed by
W. L. DAVIDSON,
*Presiding Judge of the Court of Criminal Appeals of the State of Texas.*

[Endorsed:] United States circuit court. Harvey Fullerton *vs.* The State of Texas. Writ of error. Filed August 21" 1903. J. M. Gaston, clerk.

UNITED STATES OF AMERICA:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court, a duly certified transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said court of criminal appeals of the State of Texas.

Issued at office in Dallas this 26" day of August, A. D. 1903.

J. M. GASTON, *Clerk*,
By —— ——, *D. C.*

60½ UNITED STATES OF AMERICA, *sct:*

To the State of Texas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the court of criminal appeals of the State of Texas at the city of Dallas, State of Texas, wherein Harvey Fullerton is plaintiff

in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable W. L. Davidson, presiding judge of the court of criminal appeals of the State of Texas at the city of Dallas, State of Texas, this 21st day of August in the year of our Lord one thousand nine hundred and three.

[Seal Court of Criminal Appeals of Texas.]

W. L. DAVIDSON,
*Presiding Judge of the Court of Criminal Appeals of the State of Texas.*

[Endorsed:] United States circuit court. Harvey Fullerton *vs.* The State of Texas. Citation. Filed August 21" 1903. J. M. Gaston, clerk.

UNITED STATES OF AMERICA, }
*Court of Criminal Appeals of Texas.* }

I hereby acknowledge due service of the within citation this 22nd day of August A. D. 1903.

HOWARD MARTIN,
*Attorney for Defendant in Error.*

61 *Bond for Writ of Error.*

Filed Aug. 21st, 1903.

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents, that we, Harvey Fullerton, as principal and Royal A. Ferris and E. M. Reardon, as sureties are held and firmly bound unto the State of Texas in the full and just sum of three thousand dollars to be paid to the said State of Texas, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 29th day of June in the year of our Lord, one thousand nine hundred and three.

Whereas, lately at the Austin term, 1903, of the court of criminal appeals of the State of Texas, in a suit depending in said court on appeal from the county court of Hunt county, Texas, between Harvey Fullerton, appellant and State of Texas, appellee, a judgment and decision was rendered affirming the judgment of conviction and sentence of appellant by the county court of Hunt county, Texas, to the payment of a fine of two hundred dollars and impris-

onment in the county jail for thirty days and the said Harvey Fullerton, appellant, has obtained a writ of error directed to the clerk of said court to reverse the judgment of conviction and sentence in the aforesaid suit, and citation directed to the said State of Texas citing and admonishing it to be and appear in the Supreme Court of the United States thirty days from and after the date of said citation.

62 Now the condition of the above obligation is such that if the said Harvey Fullerton shall prosecute said writ of error to effect, and answer all damages and costs and perform said judgment of conviction and sentence if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

HARVEY FULLERTON. [SEAL.]
ROYAL A. FERRIS. [SEAL.]
E. M. REARDON. [SEAL.]

The above bond is hereby approved and ordered filed and made a part of the record.

W. L. DAVIDSON,
*Pres. Judge Ct. Crim. Appeals.*

STATE OF TEXAS, }
*Dallas County.* }

Royal A. Ferris, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of three thousand dollars; and that he owns real estate to that amount, subject to execution, in the State of Texas.

ROYAL A. FERRIS.

Subscribed and sworn to before me this 29th day of June A. D. 1903.

[L. S.] SAM TURNER,
*Notary Public, Dallas County, Tex.*

STATE OF TEXAS:

E. M. Reardon, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of three thousand dollars, and that he owns property to that amount, subject to execution, in the State of Texas.

63 E. M. REARDON.

Subscribed and sworn to before me this 29th day of June A. D. 1903.

SAM. TURNER,
*Notary Public, Dallas Co., Texas.*

Filed in court of criminal appeals at Dallas August 21st 1903.
J. M. GASTON, *Clerk.*

*Order Approving Writ of Error Bond and Granting Writ of Error.*

In the Court of Criminal Appeals for the State of Texas.

HARVEY FULLERTON
*vs.*
STATE OF TEXAS.

AUG. 21", 1903.

Now on this day it appearing that the above named Harvey Fullerton has sued out a writ of error returnable to the Supreme Court of the United States directed to the court of criminal appeals of the State of Texas and has caused a copy of said writ to be filed with the clerk of said court of criminal appeals; and has filed his assignment of error with the clerk of said court of appeals; and procured a citation to be issued in said cause and has presented to the undersigned a supersedeas bond.

It is now ordered that said supersedeas bond be and the same is hereby approved and that the same operate as a stay of the execution and supersedeas of the judgment of this court rendered in the above entitled cause.

W. L. DAVIDSON,
*Presiding Judge of the Court of Criminal Appeals of the State of Texas.*

64 *Certificate as to Issues Presented.*

Filed Aug. 21, 1903.

HARVEY FULLERTON, Plaintiff in Error,
*vs.*
STATE OF TEXAS, Defendant in Error.

We hereby certify to the Supreme Court of the United States, that on the motion for rehearing in the above mentioned cause, then pending in the court of criminal appeals before us, the plaintiff in error, in oral argument and in his briefs on said motion contended and urged before us that under the evidence in the cause plaintiff in error was engaged in inter-state commerce and commerce between different States within the meaning of article one section eight of the Constitution of the United States and that the statutes of the State of Texas could not make such matters and transactions and offense and that to so do would violate said constitutional provision.

And we further certify that said contention was duly considered by us and decided adversely to plaintiff in error.

We further certify that the court of criminal appeals of the State of Texas is the court of final and last resort in the State of Texas in cases of the character of the one in question.

W. L. DAVIDSON,
*Presiding Judge of the Court of Criminal Appeals of the State of Texas.*

Filed Aug. 21", 1903, in court of criminal appeals.

J. M. GASTON, *Clerk.*

65 *Assignments of Error* of *Writ of Error* to *Supreme Court United States.*

In the Court of Criminal Appeals of the State of Texas.

HARVEY FULLERTON
*vs.*
STATE OF TEXAS.

Assignment of errors on writ of error *to* Supreme Court of the United States.

The plaintiff in error, Harvey Fullerton, assigns for error the following:

I.

That the judgment and finding of the court is contrary to and in violation of section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. And the court erred in refusing to find and hold that the acts charged against the defendant as constituting an offense, were interstate commerce transactions and in holding that the statutes of the State of Texas prohibiting transactions of the character alleged in the indictment were valid and had application to interstate commerce between the several States.

II.

The court erred in its finding that the crime and offense charged against the defendant had its venue in and occurred within the jurisdiction of the State of Texas and in not holding that the transactions in question which are charge- to constitute a crime, occurred beyond the limits of the State of Texas and in other States of the Union.

III.

66 The judgment and finding of the court was erroneous because no offense is shown to have been committed in the State of Texas.

IV.

The judgment of the court is erroneous because the indictment and complaint upon which the judgment is founded does not charge that the offense was committed within the State of Texas.

HARKLESS, O'GRADY & CRYSLER,
*Attorneys for Plaintiff in Error.*

Filed in court of criminal appeals at Dallas, Aug. 21st, 1903.

J. M. GASTON, *Clerk.*

67 *Certificate of the Clerk of the Court of Criminal Appeals.*

THE STATE OF TEXAS:

I, J. M. Gaston, clerk of the court of criminal appeals of the State of Texas, at Dallas, Texas, do hereby certify that the above and foregoing 66 pages, numbered from 1 to 66, inclusive, contain a true and correct transcript of all the proceedings had in said court of criminal appeals of the State of Texas in a certain cause therein pending, appealed from the county court of Hunt county, Texas, wherein Harvey Fullerton is appellant, and The State of Texas is appellee, said cause being numbered 2565 on the docker of said court.

Given under my hand and seal of said court, at my office in Dallas, Texas, this 26th day of August, A. D. 1903.

[Seal Court of Criminal Appeals of Texas.]

J. M. GASTON,
*Clerk Court of Criminal Appeals*
*in and for the State of Texas.*

Endorsed on cover: File No. 19,063. Texas court of criminal appeals. Term No. 112. Harvey Fullerton, plaintiff in error, *vs.* The State of Texas. Filed September 4th, 1903.

...IN THE...

# Supreme Court

## Of the United States.

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## OCTOBER TERM, 1904.

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**NO. 112.**

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Harvey Fullerton,
*Plaintiff in Error,*

*vs.*

The State of Texas,
*Defendant in Error.*

} In Error to the Court of Criminal Appeals of the State of Texas.

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BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

Plaintiff in error (defendant below) was informed against, tried, convicted and sentenced to pay a fine of $200 and thirty days' imprisonment in the county jail. The conviction was had under a statue of the state of Texas, which reads as follows:

"If any person shall, directly or through an agent or agents, manage or superintend for himself, or shall as agent

or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats or agricultural products, or corporation stocks, or shall keep any house or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and sold with no intention of an actual bona fide delivery of the article or thing so bought or sold, such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty."

*Penal Code*, 1895, *Art.* 377.

A complaint sworn to by one Langford (not a witness in the cause) was filed July 12, 1901, in which it is charged that defendant on or about the 15th day of December, 1900, in the County of Hunt, State of Texas, "did then and there unlawfully conduct, carry on and transact a business commonly known as dealing in futures, in cotton, grain, lard, meats, agricultural products and corporation stocks, and did then and there unlawfully keep a house and manage, conduct, carry on and transact therein a business commonly known as a produce or stock exchange, *and as a bucket shop*, where future contracts were then and there bought and sold with no intention of an actual bona fide delivery of the articles and things so bought and sold, against the peace and dignity of the State."

The information filed on the same day follows the language of the complaint.

A motion filed July 18, 1901, to quash the affidavit and

information was overruled. Under the practice in Texas the cause was tried by the court on July 20th, the defendant having pleaded not guilty and waived a jury. A motion for a new trial was filed and overruled. The judgment was affirmed by the court of criminal appeals, and subsequently a motion for a rehearing was denied. On the 18th day of August, 1903, a writ of error was issued from this court.

It is certified by the Presiding Judge of the Court of Criminal Appeals that on motion for rehearing "the plaintiff in error, in oral argument and in his briefs on said motion, contended and urged before it that under the evidence in the cause plaintiff in error was engaged in interstate commerce and commerce between different states within the meaning of Article 1, Section 8, of the Constitution of the United States, and that the statutes of the State of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision;" it is further certified that said contention was duly considered by the court and decided adversely to plaintiff in error; and that the court of criminal appeals is the court of final and last resort in the State of Texas in cases of the character of the one in question.

As before stated, the case was tried July 20, 1901, and a statement of facts filed July 27, by which it appears that Fullerton, the defendant, was engaged in business with A. S. Guillot, who was a commission merchant at Ardmore and Greenville, and that Fullerton had charge of the business in Greenville.

As to the manner of conducting the business the de-

fendant Fullerton's own statement is given as a statement of fact, and is substantially as follows:

"The business is conducted in this way: Suppose a man comes in today and wants to buy a 100 bales of cotton for future delivery in New York. He fills out a contract, stating how much he wants to buy, and what month he wishes it delivered, and where he wishes it delivered. I transmit this order by telegraph over our private wire we have to Kansas City, and they transmit to New York. If the man wants to buy New York cotton they transmit it to the New York cotton exchange and secure the cotton for him and report the matter to me from Kansas City—that the purchase has been made covering the order. He does not know, until I notify him through Kansas City, whether the order has been placed or not. Where a man sells a 100 bales of cotton the process is the same. If, before the day of delivery comes around, he does not want to receive—to have a delivery of the cotton he has purchased—he comes to me and orders me to sell it, and I transmit his order by wire. In the transaction of our business I do not actually sell or buy anything, and have never done so. Since I have been here I have never bought or sold anything for future delivery in any Texas market. I don't remember the date when Mr. Sam Beckham bought; it was sometime ago; he bought for July delivery. The draft on Mr. Beckham was for $3,050. It has been paid. I have made other deliveries here. Where a man comes to me and wants me to buy for him a 100 bales of cotton, suppose he has bought it last December for March delivery, and when the day for de-

livery comes around, if he has not made a sale of it, the result is we will deliver the cotton to him, or they noitfy us that they will deliver the cotton. When the contract is entered into for the thing to be bought it is stated where the delivery is to be made, and the delivery will be made there, and can be shipped wherever he wants it to. In giving the orders, when a person wants to buy or sell anything, I telegraph the order to Kansas City, to the Christie Grain and Stock company. I don't, in fact, for myself, or anybody, buy or sell these things. In addition to this character of business, we furnish the market reports to cotton men. Say they want to buy of a farmer a couple of hundred bales of cotton, to be delivered in ten days. They come to us at the time they buy it; they know the market is so much higher, and they come to us and place an order in New York to sell 100 bales of cotton, and they pay us here for the markets so much per month. They pay us this to find out what the market quotations are—that is a part of our business. I receive these reports every time during the day that there is a fluctuation, and I report to the cotton men, who buy cotton, what these quotations are, and in that way they are advised of the state of the market. I report to the grain men and commission men generally—these are the kind of transactions that also take place. * * * We do not buy any futures in this state. Beckham's deal was the same as the rest—he signed the slip, and it was to be delivered when he wanted it delivered. The deal was consumated in Kansas City. I would not transact any business for a man that was not responsible and could not deliver the cotton."

It further appears by the statement of facts that there are exchanges of this kind in every town in Texas the size of Greenville. The party ordering simply instructs the defendant to buy whatever it was that he wanted to buy, and if he wanted to buy a 100 bales of cotton in Decebmer, to be delivered in New York in March, he instructed defendant to buy a 100 bales of cotton on the terms mentioned. The person thus ordering signs a slip for the purchase of the cotton, and defendant then telegraphs to some stock exchange, or somebody, to buy the cotton to cover the amount of his order. It is a fact that the sale of the cotton does not take place until there is a confirmation of the sale by wire from the party to whom defendant wires, announcing the fact that it has been placed. Nothing is actually bought from defendant; he acted as agent; the parties ordering would tell him to buy or sell for them; defendant would do so by telegraphing to someone outside of the state to place that order either to purchase or sell. That was the invariable rule. The defandant was simply paid a commission on whatever he bought or sold for customers; the contract was not consumated until there was an acceptance of it from Kansas City or from any point to which defendant wired. If it was not confirmed there was no purchase or sale. All the slips provide that an actual delivery is expected unless the contract is closed out before delivery day comes around. The following is a copy of the slip referred to. If the order was to sell the word "sell" was used instead of the word "buy:"

## COPY OF THE SLIP.

No. ——. Time——.

GREENVILLE, TEXAS, 190—.

*Guillot Bros., Commission Merchants.*

Please buy for my account and risk, subject to the rules of the exchange.

*Article* ————

*Price* ————

*To be delivered at* ————

During————

Partial payment ————. Closed ————. This order is offered for the acceptance of your correspondents, subject to the conditions on the reverse side, which have been fully noted, and which is hereby fully agreed to. I hereby appoint you as my agent to secure an acceptance of the same.

Signature ————————

## NOTICE.

It is assumed that the party giving this order is in every way financially able to complete the contract. It is understood that this order is subject to the acceptance of the correspondents of said Guillot Bros., at Kansas City, at which point all necessary revenue stamps are affixed. It is further understood that said Guillot Bros., are employed as my agents to use their best endeavors to secure an acceptance of this order, and that they are not to be held liable for any wire failure or other unavoidable accident which may prevent satisfactory service. All orders for the sale or purchase of any commodity or articles or securities are received

and executed with the distinct understanding that actual delivery will be insisted upon, and the party giving this order so understands and agrees. Parties giving orders for stocks will indicate when they wish these securities delivered. On grain, provisions and cotton, shipping instructions will be asked for and furnished on settlement day, as provided for by the rules of the exchange where the contracts are placed.

## QUESTION INVOLVED.

The question involved is whether the court erred in denying the contention of defendant that he was engaged in interstate commerce, and whether under the statement of facts a conviction was authorized, and both phases of the question are raised and decided by the court under the statement of facts.

## ASSIGNMENT OF ERRORS.

The specification of errors relied upon and intended to be urged is as follows:

1. That the judgment and finding of the court is contrary to and in violation of Section 8, Article 1, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. And the court erred in refusing to find and hold that the acts charged against the defendant as constituting an offense were interstate commerce transactions, and in holding that the statutes of the State of Texas prohibiting transactions of the character alleged in the indictment were valid and

had application to interstate commerce between the several States.

2. The court erred in its finding that the crime and offense charged against the defendant had its venue in and occurred within the jurisdiction of the State of Texas, and in not holding that the transactions in question which are charged to constitute a crime, occurred beyond the limits of the State of Texas and in other States of the Union.

3. The judgment and finding of the court was erroneous because no offense is shown to have been committed in the State of Texas.

## ARGUMENT.

### I.

We cite again, for the convenience of the court, the provisions of the statute of Texas as embodied in the opinion of the Court of Criminal Appeals in Fullerton vs. State of Texas:

"If any person shall, directly, or through an agent or agents, manage to superintend for himself, or shall as agent or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, any kinds of meats or agricultural products, or corporation stocks, or shall keep any house or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and sold with no intention of an actual bona fide delivery of the article or thing so bought or sold,

such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty, etc." (Record, p. 29.)

The case itself is not officially reported, but may be found in 75 Southwestern Reporter, 534.

*The statute must be construed to charge an offense within the limits of the State of Texas.*

In the information the offense is charged as having been committed in the County of Hunt, State of Texas, and it is alleged that the defendant, Fullerton, did then and there unlawfully conduct and carry on a business commonly known as a produce or stock exchange and *as a bucket shop*, where future contracts were then and there bought and sold, with no intention of an actual *bona fide* delivery of the articles and things so bought and sold. (Record, p. 2.)

To give it a construction which would make it apply to transactions completed without the State would be in violation of the provision of the Federal Constitution. This is ruled, in practically a similar case, in *Brennan vs. the City of Titusville*, 153 *U. S.* 289. Brennan was engaged simply in taking orders to be executed outside of the State for parties inside of the State.

So it was held by Judge Hook of the United States Court for the district of Kansas that one Bergen, who was simply taking orders for liquors in the State of Kansas for people in the State of Kansas, to be executed and approved outside of the State, and where such orders were only to become binding when they were approved by a wholesale firm in Missouri, that Bergen had not violated any law of the state

of Kansas, because the law of the State of Kansas could not, and should not be construed to make a party guilty of the violation of that law who was simply engaged in the business of making contracts with citizens outside of the State, subject to their approval, to be shipped within the State, as this is purely a matter of interstate commerce. (Habeas corpus proceedings, in re. Bergen, 115 Fed. 339.)

This very question, however, has also been decided by the Court of Criminal Appeals of Texas in the recent case of Scales vs. State (not officially reported), 81 S. W. 947.

Scales was convicted in the court below under the statute. The judgment was reversed, and it was held that the instructions asked by Scales should have been given, "that what was done by him was not conducting a business for the sale of cotton at Taylor, in Williamson county, but he simply acted as an agent for the parties desiring to sell or purchase cotton, and that the sale was made and consummated in New Orleans or New York, as the case might be."

We are here confronted with a most remarkable condition of affairs. We are not able to reconcile the two cases; each is diametrically opposed to the other. The judgment in the Scales' case was reversed and Scales was discharged; the judgment in the Fullerton case was affirmed, and Fullerton sentenced. In the Scales case the court observes: "Appellant strenuously insists that the facts presented in the record, and almost without controversy, required the court to give the requested instruction."

Varying the phraseology a trifle, we insist that the facts presented in the record in the case at bar required a re-

versal of the judgment and a discharge of Fullerton. The court then occupies two columns in stating appellant's mode of doing business, as follows:

"That a person desiring to purchase cotton for future delivery would come to appellant's office in the city of Taylor, and make request to purchase, say, 100 bales of cotton in the city of New Orleans, for delivery at a future day, at a stated price. That he would take the offer, and telegraph to some member of the Cotton Exchange in New Orleans, and that this broker in New Orleans to whom the order was telegraphed would take the same and go upon the exchange in New Orleans and make the offer to buy the number of bales covered in the order, and if the offer was accepted by any one on the exchange, then the contract would be closed, the broker acting under the instruction sent him by appellant. When the contract was so made, the broker to whom the order had been telegraphed in New Orleans would telegraph acceptance of the same to the firm of Scales & Company, at Taylor; that the order had been executed, and the contract made for the delivery of the cotton. On receipt of this, notification was given to the purchaser at Taylor by appellant; and thereupon said purchaser would pay to the firm of Scales & Co. at Taylor, the sum of $2 per bale, called 'margin,' to cover fluctuations in the market price of cotton. That on every 100 bales of cotton so purchased a commission of $10 was charged by appellant, $5 of which he retained, and the other $5 he sent to the broker empolyed by him in New Orleans. On the payment of this money by the purchaser upon the transaction, the firm of Scales & Co.,

who at all times kept money to their credit with the broker through whom they dealt at New Orleans, would telegraph to the New Orleans broker that the margin of $2 per bale had been paid to them, and to charge their accounts with said sum. That if, at any time, the purchaser desired his cotton to be sold, Scales & Co. would telegraph the broker in New Orleans, who would go upon the exchange and sell the contract, if he could do so, at the price stated. That all of such transactions were real, and not fictitious, and that the broker would make the sale if he could. If consummated he would telegraph back to Scales & Co. that he had sold the contract and the price for which the sale was made, and would notify Scales & Co. that they were credited with the profits, if any had accrued, or, if there was a loss, charge them with the loss. Thereupon Scales & Co. would make a settlement at once, with the party at Taylor, according to the report of the transaction had in New Orleans. In cases where the contracts were made and the money deposited with Scales & Co. for the purchase of cotton, the money was transmitted to New Orleans by telegraph, and there deposited to cover the contract for the party making the same, and all moneys received at New Orleans on account of profits made on such transactions were telegraphed to Taylor, and there paid by Scales to the party to whom it belonged. That Scales & Co. did not receive any part of the money put up as margin, except the commission of $5 on every 100 bales of cotton bought or sold, nor did they retain any part of the money, when the contract was closed out at New Orleans and New York, but the whole of the same

was paid to the person who was the owner of the contract which had been sold.

It is further stated that all these transactions in New Orleans were with the cotton exchange, and the names of the parties with whom he dealt were given, and that all such transactions were real, and not fictitious; that they were all made and agreed to be made and to be governed by the rules and by-laws of said exchange, where they were to be executed, and that, in their making, the understanding was that the rules of the said exchange were that all cotton should be actually delivered upon the contracts in accordance with the terms of the contracts, and all persons were prohibited from making a contract on either of said exchanges in New Orleans or New York relating to the future delivery of cotton which did not contemplate actual and bona fide delivery thereof; that witness had never been informed by any one, nor did he ever know, that it was the intention or purpose of any person making the transaction through the exchange or brokerage business of E. G. Scales & Co. that they did not intend, if they kept their contracts until their maturity, not to accept cotton bought, or actually deliver that sold, in accordance with the terms of the contract; that "said firm never did at any time, in conducting their business at Taylor, in Williamson county, sell any contracts or contract, for the future delivery of cotton, or grain, or produce, or meats, etc., and never did in their business at said point, buy from any person, any future contracts for any such articles, or delivery thereof; that their only business was that of brokers, and that all they did was to accept or-

ders from persons who wished to buy cotton, and telegraph such orders to the different exchanges where the persons desired to have the orders executed, and have them there executed through brokers as hereinbefore explained."

This is a substantial statement of appellant's business, as testified to by him, but we do not understand it to materially vary in any respect from the testimony given by the state's witnesses.

As stated, appellant contends that this was not a sale at all by him in the State of Texas, but he acted merely as the agent of the buyer or purchaser, as the case might be, and the sale was actually consummated through another agent in New Orleans; that what they did was simply to convey the offer to sell or buy to the agent at New Orleans, and the transaction was closed by him. We believe this contention is correct, and, under our statute, it requires, in terms, that the person, in order to be guilty of the offense defined, must conduct or carry on a business where future contracts are bought and sold. Under the authorities, as we understand them, the facts here stated do not show that appellant either bought or sold cotton in the City of Taylor, Williamson County. True, his business was to receive offers for the sale and purchase of cotton. He conveyed these propositions to parties in New Orleans. There the proposition was accepted, the minds of the parties met, and the sale or purchase was made. This, we understand to be the doctrine enunciated by the current of authorities."

(*Citing a large number of authorities.*)

The Court of Criminal Appeals is well fortified. The

facts in the authorities stated are practically the same as in the case at bar, and the several defendants were found not guilty.

Among the authorities cited by the court is State vs. Gritzner, 134 Mo. 512, which is a good illustration of, and supports the contention of appellant. Gritzner was indicted under a statue broader than the statue of Texas for dealing in futures, and the testimony showed that when he received orders in Saline County, Missouri, he transmitted those orders for acceptance to Edwards & Company at Chicago, Illinois, of the following purport: "Buy five wheat or buy five corn," and tended to show that no deliveries were contemplated under these transactions. The court, after holding that the statute must be construed as not intended to create offenses or otherwise regulate the conduct of persons beyond its territorial limits, observes in reference to the facts before it:

'Now, no offense certainly was committed until and unless communication was established between the mind of defandant and the brokers in Chicago to-wit: when the telegram reached that point, because until that juncture no offer to buy or sell, or otherwise agree could have been made. In a word, the case stands here, conceding the reception of the telegram, as if defendant in Slater had spoken to his broker in Chicago over a long distance telephone when, of course, but one opinion would be entertained as to the *locus* where the offer was made, and consequently the crime committed. And it has been ruled in this state, as well as elsewhere, that a person cannot be punished in this State where the of-

fense was actually consummated in another State. *Even though some act constituting a part of the offense, or making the offense possible was committed within this State.* Moreover, as criminal and penal statutes are to be strictly construed, construed strictly, if not *strictissimi juris;* as no one is to made subject to such statutes by implication. As they are non-elastic, as only such transactions are covered by them as are within both their spirit and letter, *as the statute in question does not make it punishable for a citizen of this State to communicate with a citizen of and in another State with a view to deal in options,* it stands to reason as well as to authority, that no such offense as that just mentioned is by the statute created.

See the like effect State vs. Shaeffer, 89 Mo. 271. The Missouri statute under which the Missouri cases were decided reads as follows:

Section 3931, Rev. St. 1889: "Option Dealing Prohibited—Punishment For. All purchases and sales, or contracts, and agreements for the purchase and sale of the shares of the stocks, or bonds, of any corporation, or petroleum, provisions, cotton, grain, or agricultural products whatever, either on margin or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold, and all the buying or selling or pretended buying or selling of such property, on margins or on optional delivery, when the party selling the same does not intend to have the full amount of the property on hand or under his control to deliver upon such sale, or when the party buying of any of such property or offering

to buy the same, does not intend actually to receive full amount of same if purchased, are hereby declared to be gambling and unlawful, and the same are hereby prohibited. Any company, co-partnership or corporation, or member, officer, or agent thereof, or any persons found guilty of a violation of the provisions of this section shall be fined in a sum not less than three hundred dollars, nor more than three thousand dollars." Section 3932: "What Necessary to Constitute Offense. It shall not be necessary, in order to commit the offense defined in the preceding section, that both the buyer and seller shall agree to do any of the acts above prohibited, but the said offense shall be complete against any corporation, association, co-partnership, or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership, or persons, or agent thereof, who shall communicate, receive, exhibit or display in any manner any such offer to buy and sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall, for each offense, be deemed and held to be an accessory thereto, and upon conviction thereof shall be fined the same as the principal; and any such corporation, association, co-partnership or person, or agent, permitting any such communication, reception, exhibit, or display, shall, for every such offense, be fined a sum not less than three hundred dollars nor more than two thousand dollars."

The learned judge who delivered the opinion in the case at bar in the Criminal Court of Appeals, *interalia*, ob-

serves: "The facts show that appellant opened a business in Greenville, where he bought and sold futures in cotton and wheat; that he acted as the agent of the purchasers and sellers; that he had connections East and, perhaps, in Kansas City, with the Christie Bros.; that he was carrying it on for himself and acting as the agent of parties who were buying and selling futures in cotton and wheat and that under his contract the real intent was simply for these parties to speculate in the rise and fall of the prices with no bona fide intention of delivery on the part of the appellant. That the parties purchasing had no intention of expecting a delivery of the cotton under the purchase of the futures and that the whole matter was understood by the parties at the time to be simply a wager upon the rise and fall of the prices—a speculation or bet on the fluctuation of the prices in the article in which they were dealing.

There is nothing in the statement of facts to justify such an interpretation. The court will bear in mind that we are dealing with a *Statement of facts*, and not a statement of evidence. As regards the evidence the court will not only consider the oral evidence as given, but also such inferences as may be legitimately drawn therefrom, but even in this view, there are no inferences that can legitimately be drawn from the statement of facts as evidence only which can properly be said to support the observations of the learned judge delivering the opinion.

The language of the statute itself is somewhat confusing, unless considered as a whole, and then it is sufficiently explained by the use of the words "bucket shop," which it

defines to mean where future contracts are bought and sold with no intention of an actual *bona fide* delivery of the article or thing so bought or sold.

There can be no objections to dealing in futures, unless thus explained. It cannot be questioned that a contract between A and B may be validly made for the sale of certain commodities *to be delivered in the future*, when A has not the commodities at hand, no contract of purchase for them, and when, if called upon by B to deliver, he expects to go into the market and buy them and perform the terms of his contract.

There was nothing bought or sold by the defendant, and no executory contract of sale made by him. There is no conflict in the statement of facts upon this question. The defendant says: "As a matter of fact I did not sell any of those things; I simply placed the orders that were left with me." (Record, p. 19.)

Mr. Guillot says: "We never close the contract over there with the customer ourselves. This business over here itself never bought or sold anything for future delivery; it has made quite a number of actual deliveries upon contracts that were executed through it. (Record, p. 14.) He also defines a bucket shop: "A bucket shop is where the orders are *filled in the office;* it doesn't contemplate delivery. In our business we notify our customers that we will fulfill the contract. We certainly do aim to deliver the stuff." (Record, p. 15.)

We reach the same result if we take the statement of facts as arranged under the names of the witnesses for the

state. Mr. Brown says: "I did not actually buy anything of him. He was acting as agent. I did not sell anything to him. I would tell him to sell or buy for me. I simply instructed to buy or sell for me whatever I wanted, and he did it by telegraphing to someone outside of the state toplace that order either to purchase or sell. That was the invariable rule with me. (Record, 7.) The reason I never had anything delivered to me was because he closed out for me, under my instructions *before the date of the delivery came around.* (Ibid) I recognized that under my contract, which Mr. Fullerton had executed for me, I was entitled to the delivery of the cotton if I wanted it. It would have been delivered to me if I had instructed; instead of doing that, however, I closed the matter up by instructing a sale of it, and he sold it under my instructions." (Record, 8.)

Mr. Pearce says: "As I understand it, all my orders were telegraphed to Kansas City, Mo., and consummated there. I did not actually buy anything of him whatever; he was simply buying and selling for me in the markets—that is the way I understand it." (Record, 10.)

Mr. Williams says: "I recognized that when I bought that cotton, if the contract was finally consummated—if I didn't sell before the date of delivery—it would be delivered to me at the place where I bought on the 25th of that month. The 25th of the delivery month is the day upon wich settlements are made. All these contracts I made either for purchases or sales were consummated in one of the markets outside of this state. I neither bought or sold to defendant in this case anything, future or otherwise, he simply

executed my orders for making these purchases, or sales, in these various markets. That is, they are executed by telegraphing to these markets and the sale or purchase confirmed there. There was no purchase or sale in any instance until the order was telegraphed to the outside markets and executed and sent in. As I said a while ago, many orders failed to be executed where the price was stipulated. It could not be consummated except in the market where it was bought." (Record, 12-13.)

As held in re Bergen, supra—it was shown that Bergen was simply taking orders in the State of Kansas for people in the State of Kansas, to be executed and approved outside of the State, and that such orders only were to become binding when they were approved by the wholesale firm in Missouri; and so are the Missouri cases cited *supra*. The principle controlling is clearly stated in Brennan vs. the City of Titusville, *supra*.

> *Communication by telegraph is interstate commerce, Leloup vs. Port of Mobile, 127 U. S.* 640.

There is no material distinction between the Scales case and the case at bar. It is stated in the Scales case as heretofore quoted: "Under the authorities, as we understand them, the facts here stated do not show that appellant either bought or sold cotton in the City of Taylor, Williamson county. True, his business was to receive offers for the sale and purchase of cotton. He conveyed these propositions to parties in New Orleans. There the proposition was accepted, the minds of the parties met, and the sale or

purchase was made. This, we understand to be the doctrine enunciated by the current of authorities." (Citing a large number of authorities.)

If the statute of Texas is to be construed as covering only offenses within the limits of the State, as is certainly ruled by the authorities, it surely appears that the defendant Fullerton was not guilty of offending against the statute.

The learned judge delivering the opinion in the Court of Criminal Appeals (Rec. pp. 28-30) is equally at fault in saying that under defendant's contract the real intent was simply for the parties to speculate in the rise and fall of prices; that on the part of the parties making the purchase they had no intention of expecting a delivery of the cotton, and that the whole matter was understood by the parties at the time to be simply a wager upon the rise and fall of the prices. (Rec. pp. 29-30.)

There is not a single sentence in the statement of facts which can be tortured into such a meainng. It is held in the Scales case in accordance with the authorities that both parties must understand the agreement to mean that there will be no delivery of the thing sold. The court observes: "We understand the authorities to teach that it is not alone sufficient that one of the parties to the contract contemplates that there will be no delivery of the thing sold, but that both must so understand the agreement. In this respect the burden is on the state to show, before either of the parties to the contract can be convicted, that both parties engaged in a wagering contract." (Citing a large number of authorities.)

It will be remembered that the slip which is signed by the purchaser, or person offering to purchase at a certain price, contains the words: "All orders for the sale or purchase of any commodity or article or securities are received and executed with a distinct understanding that *actual delivery* will be insisted upon, and the party giving this order so understands and agrees." (Rec., 20.)

It is quite unimportant what the offeror says subsequently as to his expectation. The offense, if committed at all, is committed at the time of the signing and acceptance of the slip. The question of intention, we think, is closed by the very terms of the written offer. It cannot be altered or varied by parol; after acceptance it is binding upon both parties. Most of the evidence on the question of a possible intention not to deliver is of a negative character; the absence of knowledge on the part of the witness of any particular case in which delivery was made and is not entitled to consideration. It is reasonable to suppose that a hundred deliveries may have been made without the knowledge of a particular witness as to the particular deliveries. In the statement of facts arranged under the name of the state witness, Mr. Brown, the witness says: "I think that all these slips specify that an actual delivery is expected unless the contract is closed out before delivery day comes around. The reason I have never had anything delivered to me was because he *closed out for me under my instructions before the date of delivery came around.*" (Rec., 7.)

In the Scales case the defendant offered the charters of the New Orleans and New York Exchanges, showing that,

under the charter of these corporations, no one belonging to such exchanges was permitted to make a sale of cotton, etc., unless an actual delivery was contemplated. The evidence was rejected in the court below, but held admissible by the Court of Criminal Appeals. This does not appear in the case at bar, but the further observations of the court are applicable:" But in the absence of such proof, a sale through a corporation would be presumed to be in accordance with the power and method prescribed in the charter of the corporation. What we have said with reference to the charters also applies to the rules and regulations adopted by said exchanges."

Further consideration of the question, we think, is unnecessary, and we conclude by again quoting from the Scales case certain observations which seem pertinent to the case at bar.

Referring to the case then before it (Scales case) the court observes: "In the case at bar, so far as the proof is concerned, the state failed to show that the transaction charged against appellant was a wagering contract. Appellant, on the other hand, assumed the burden and showed that, under the rules of law as laid down by the authorities, what he did, if he could be held to have consummated the contract in Taylor, was not a wagering contract; that is, that the parties in fact intended an actual delivery of the cotton. It may be that the modus operandi here pursued is an evasion of the spirit of the statute in question, but cetrainly the proof does not establish a violation of the letter of our law on the subject."

We respectfully urge that the judgment of the Court of Criminal Appeals of Texas should be reversed, and the defendant discharged.

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# Supreme Court of the United States.

No. 112.—October Term, 1904.

Harvey Fullerton, Plaintiff in Error, vs. The State of Texas. } In error to the Court of Criminal Appeals of the State of Texas.

[January 9, 1905.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

Fullerton was charged by information with unlawfully conducting, carrying on and transacting the business of dealing in futures in cotton, grain, &c.; and unlawfully keeping a bucket shop, so called, "where future contracts were then and there bought and sold with no intention of an actual *bona fide* delivery of the articles and things so bought and sold." He was found guilty as charged, and sentenced to a fine of two hundred dollars and imprisonment for thirty days. The case was carried to the Court of Criminal Appeals of Texas, and judgment affirmed. The court in its opinion stated the contention to be that the evidence did not show a violation of the statute, namely, Art. 377 of the Penal Code; and held on a consideration of the facts that Fullerton had clearly brought himself within and violated the statute. 75 S. W. Rep. 534. Fullerton thereupon moved for a rehearing, which motion was overruled. This application for rehearing assigned, among other grounds, that the statute as construed by the court was in violation of the Constitution of the United States, vesting in Congress the power to regulate commerce among the several States. In overruling the motion, the court delivered a second opinion on the question of the sufficiency of the indictment, which was attacked, not in the motion for rehearing, but in an additional brief presented after the submission of that motion. The court, however, held the indictment good, and, after stating that "the motion for rehearing was mainly devoted to an attack on the original opinion wherein the evidence was held sufficient," adhered to that opinion. 75 S. W. Rep. 535. No reference to the Constitution of the United States was made by the court, nor does the record disclose any such reference except in the petition for rehearing as before stated.

We have repeatedly ruled that it is too late to raise a Federal question by a petition for rehearing in the Supreme Court of a State after that court has pronounced its final decision, although if the State court entertains the petition and disposes of the Federal question, that will be sufficient. *Mallett* v. *North Carolina*, 181 U. S. 589. In that case it was observed:

"Had that court declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action."

Some weeks after the denial of the motion for a rehearing, this writ of error was allowed by the presiding judge of the Court of Criminal Appeals, who certified that on that motion it was contended "that under the evidence in the cause plaintiff in error was engaged in interstate commerce and commerce between different States within the meaning of article one, section eight, of the Constitution of the United States, and that the statutes of the State of Texas could not make such matters and transactions an offense, and that to do so would violate said constitutional provision." And further "that said contention was duly considered by us and decided adversely to plaintiff in error."

But on the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or declined to pass on the alleged constitutional question, in terms, because it was suggested too late, and nothing is more firmly established than that such a certificate cannot in itself confer jurisdiction on this court. *Henkel* v. *Cincinnati*, 177 U. S. 170; *Dibble* v. *Bellingham Bay Company*, 163 U. S. 63.

*Writ of error dismissed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*